No. 02-1389 Status: ARGUED
Title: United States, Petitioner
v.
Abel C. Galletti, et al.
Docketed: March 21, 2003
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (01-55953, 01-55954)
Decision Date: August 8, 2002
Rehearing Denied: November 20, 2002

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Feb 4 2003	Application (02A641) to extend the time to file a petition for a writ of certiorari from February 18, 2003 to March 20, 2003, submitted to Justice O'Connor.
Feb 6 2003	Application (02A641) granted by Justice O'Connor extending the time to file until March 20, 2003.
Mar 20 2003	Petition for writ of certiorari filed. (Response due April 21, 2003)
Apr 3 2003	Order extending time to file response to petition to and including May 20, 2003.
May 20 2003	Brief of respondent Abel C. Galletti, et al. in opposition filed.
Jun 3 2003	Reply of petitioner United States filed.
Jun 3 2003	DISTRIBUTED for Conference of June 19, 2003.
Jun 23 2003	Petition GRANTED.
Jun 25 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including September 5, 2003.
Sep 4 2003	Joint appendix filed.
Sep 5 2003	Brief of petitioner United States filed.
Sep 22 2003	Extension of time within which to file respondents' brief on the merits to and including November 10, 2003.
Nov 3 2003	SET FOR ARGUMENT Monday, January 12, 2004.
Nov 4 2003	CIRCULATED.
Nov 6 2003	Record received from the U.S.C.A.for the 9th Circuit. (1 envelope)
Nov 10 2003	Brief of respondents Abel C. Galletti, et al. filed. (Distributed)
Nov 12 2003	Record received from the U.S.D.C. for Central California. (1 box)
Dec 15 2003	Reply of petitioner United States filed. (Distributed)
Jan 12 2004	Argued. For petitioner: Kent L. Jones, Assistant to the Solicitor General, Washington, D.C. For respondents: David R. Haberbush, Long Beach, Cal.
Jan 22 2004	20 copies of record material submitted by counsel for respondent received and distributed.

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No. 02-1389

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL COSMO GALLETTI AND SARAH GALLETTI;
FRANCESCO BRIGUGLIO AND ANGELA BRIGUGLIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in order to enforce the derivative liability of partners for the tax debts of their partnership, the United States must make a separate assessment of the taxes owed by the partnership against each of the partners directly.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	19
Appendix A	1a
Appendix B	14a
Appendix C	46a
Appendix D	47a

TABLE OF AUTHORITIES

Cases:

Anderson v. *United States*:	
15 F. Supp. 216 (Ct. Cl. 1936), cert. denied, 300 U.S. 675 (1937)	11, 12, 17
15 F. Supp. 225 (Ct. Cl. 1936), cert. denied, 302 U.S. 695 (1937)	12
Armadillo Corp., In re, 410 F. Supp. 407 (D. Colo. 1976), aff'd, 561 F.2d 1382 (10th Cir. 1977)	10
Ballard v. *United States*, 17 F.3d 116 (5th Cir. 1994)	9
Calvey v. *United States*, 448 F.2d 177 (6th Cir. 1971)	9
Commissioner v. *Sunnen*, 333 U.S. 591 (1948)	17
El Paso Ref., Inc. v. *IRS*, 205 B.R. 497 (Bankr. W.D. Tex. 1996)	4
Leighton v. *United States*, 289 U.S. 506 (1933)	14
Livingston v. *United States*, 793 F. Supp. 251 (D. Idaho 1992)	9
Otte v. *United States*, 419 U.S. 43 (1974)	10
Payne v. *United States*, 247 F.2d 481 (8th Cir. 1957)	12-13
Remington v. *United States*, 210 F.3d 281 (5th Cir. 2000)	7, 9

Cases—Continued: Page

Robby's Pancake House, 24 B.R. 989 (Bankr. E.D. Tenn. 1982) 9
Ross, In re, 122 B.R. 462 (Bankr. M.D. Fla. 1990) 9
South Corp. v. *United States*, 690 F.2d 1367 (Fed. Cir. 1982) 11
Thor Power Tool Co. v. *Commissioner*, 439 U.S. 522 (1979) 18
United States v. *Botefuhr*, 309 F.3d 1263 (10th Cir. 2002) 13, 14, 17
United States v. *Dixieline Fin., Inc.*, 594 F.2d 1311 (9th Cir. 1979) 12, 13
United States v. *Hays*, 877 F.2d 843 (10th Cir. 1989) 9
United States v. *Hunter Eng'rs & Constructors, Inc.*, 789 F.2d 1436 (9th Cir. 1986), cert. denied, 479 U.S. 1063 (1987) 13
United States v. *Updike*, 281 U.S. 489 (1930) 7, 14
United States v. *Walker*, 217 F. Supp. 888 (W.D.S.C. 1963) 13
United States v. *Wright*:
868 F. Supp. 1970 (S.D. Ind. 1994), rev'd, 57 F.3d 561 (7th Cir. 1995) 16
57 F.3d 561 (7th Cir. 1995) 3, 6, 7, 15, 16-17
Young v. *Riddell*, 283 F.2d 909 (9th Cir. 1960) 6, 8

Statutes:

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
11 U.S.C. 101 ..... 2, 69a
11 U.S.C. 502 ..... 2, 69a
11 U.S.C. 1301 *et seq.* (Ch. 13) 3
Internal Revenue Code (26 U.S.C.):
§ 2502(c) 14
§ 3102 ..... 2, 70a
§ 3102(b) 2, 10, 70a
§ 3111 ..... 2, 70a
§ 3111(a) 2, 10, 70a

Statutes—Continued: Page

§ 3301(a) 10
§ 3401(d) 2
§ 3403 ..... 2, 10, 71a
§ 3404 ..... 2, 71a
§ 3505 12
§ 3505(a) 13
§ 3505(b) 13
§ 6201 ..... 2, 71a
§ 6201(a) 10, 71a
§ 6203 ..... 2, 11-12, 72a
§ 6324(b) 14
§ 6501 ..... 2, 4, 72a
§ 6501(a) 3, 4, 5, 8, 9, 10, 15, 18, 72a
§ 6502 ..... 2, 72a
§ 6502(a) 9, 10, 11, 72a
§ 6502(a)(1) 3, 15, 16, 72a-73a
§ 6503 17
§ 7701(a)(1) 5
§ 7701(a)(14) 5
Cal. Corp. Code (West 2003):
§ 16306 ..... 2, 3, 73a
§ 16306(a) 8, 73a
§ 16307 ..... 2, 73a
§ 16307(c) 15, 73a
Uniform Partnership Act (1997) § 306(a), 6 U.L.A. 117 (2001) 8

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a), which superseded the initial opinion of the court (298 F.3d 1107), is reported at 314 F.3d 336.[1] The

[1] The opinion and judgment of the court of appeals, as well as the order denying the petition for rehearing, contain separate docket numbers for the associated bankruptcy cases of the Gallettis and the Briguglios, who are the general partners of the partnership whose tax liabilities are at issue in this case.

opinions of the district court (App., *infra*, 18a-30a, 31a-43a) are reported at 88 A.F.T.R.2d (RIA) 5580 and 87 A.F.T.R.2d (RIA) 1639. The opinions of the bankruptcy court (App., *infra*, 44a-55a, 56a-68a) are reported at 86 A.F.T.R.2d (RIA) 6433 and 86 A.F.T.R.2d (RIA) 6438.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2002. The petition for rehearing was denied on November 20, 2002. App., *infra*, 1a-4a. On February 6, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including March 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of 11 U.S.C. 101 and 502, 26 U.S.C. 3102, 3111, 3403, 3404, 6201, 6203, 6501 and 6502, and Cal. Corp. Code 16306 and 16307 (West 2003), are set forth in the Appendix, *infra*, 69a-73a.

STATEMENT

1. Respondents are the general partners of a partnership named Marina Cabrillo Partners. App., *infra*, 4a. During the years relevant to this case, the partnership employed various workers and, as a consequence, accrued liability for federal employment taxes. Federal employment taxes accrue against the "employer" (*e.g.*, 26 U.S.C. 3102(b), 3111(a)) of any person who "performs or performed any service, of whatever nature, as the employee of such person." 26 U.S.C. 3401(d). Because the partnership was the "employer," the social security (FICA) taxes and Federal Unemployment Tax Act (FUTA) taxes relating to its employees were direct liabilities of the partnership. App., *infra*, 62a.

On various dates between 1994 and 1996, the Internal Revenue Service made assessments for the unpaid federal employment tax liabilities of the partnership that accrued for periods from 1992 through the first quarter of 1995. Each of those assessments was made within three years after the filing of the partnership's employment tax return. App., *infra*, 4a-5a, 42a. As a consequence of those timely assessments (26 U.S.C. 6501(a)), the federal limitations period for commencing a judicial action to collect the unpaid tax liabilities of the partnership was extended to ten years from the dates of assessment (26 U.S.C. 6502(a)(1)).[2]

2. After respondents encountered financial difficulties, they sought protection from their creditors under Chapter 13 of the Bankruptcy Code. The United States filed proofs of claim in their personal bankruptcy cases to recover the unpaid federal employment taxes owed by the partnership. App., *infra*, 45a, 57a.

a. Respondents objected to the proofs of claim. They acknowledged that, as general partners, they were derivatively liable for all lawful debts of the partnership under state law (Cal. Corp. Code § 16306 (West 2003)). They also acknowledged that the assessment of the tax against the partnership was timely and valid. They contended, however, that, federal law prohibits the collection of the tax liabilities of the partnership from its partners unless a separate assessment of the taxes has been made against the partners individually. App., *infra*, 45a, 58a. They further

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[2] "Until 1990 the statute of limitations for the collection of tax debts was six years from assessment. That year Congress increased the period to ten years. Pub. L. 101-508, amending 26 U.S.C. § 6502(a)." *United States* v. *Wright*, 57 F.3d 561, 562 (7th Cir. 1995).

contended that the United States is now barred by 26 U.S.C. 6501(a) from making such assessments against the partners because more than three years had elapsed since the partnership filed the tax returns for the periods for which the tax liabilities arose. App., *infra*, 46a, 59a.

In response, the government explained (i) that the assessment against the partnership was timely and valid and (ii) that the derivative liability of the general partners for the resulting debt of the partnership arises under state law, not under the Internal Revenue Code. Accordingly, when, as here, a valid assessment has been made of the taxes owed by the *partnership*, no additional, individual assessment against the partners is required to permit suit to proceed against them for their derivative, state-law liability. App., *infra*, 47a, 59a.

b. The bankruptcy court disallowed the government's claims, and the district court affirmed that ruling. Relying on the general principle that "a valid assessment is a prerequisite to tax collection" (App., *infra*, 28a (quoting *El Paso Refining, Inc.* v. *IRS*, 205 B.R. 497, 499 (Bankr. W.D. Tex. 1996)), these courts held that the employment taxes owed by the partnership must be assessed against the partners directly before they could be collected directly from them. Because no assessment had been made against the partners individually within the three-year period provided by 26 U.S.C. 6501, the bankruptcy court and district court concluded that the government's claims are now barred in this case. App., *infra*, 28a-29a, 41a-42a; *id.* at 51a- 54a, 62a-66a.

3. The court of appeals affirmed. App., *infra*, 1a-17a. The court first stated that, under Section 6501(a) of the Internal Revenue Code, the government is to

collect tax deficiencies "by making an assessment against the taxpayer within three years of the filing of the taxpayer's return." App., *infra*, 6a. The court reasoned that respondents, as general partners, are "taxpayers" who are subject to assessment for the employment taxes owed by the partnership. The court noted the term "taxpayer" is defined in Section 7701(a)(14) of the Code as "any person subject to any internal revenue tax" and Section 7701(a)(1), in turn, defines the word "person" to include "an individual" as well as a "partnership." App., *infra*, 7a-8a. Relying on these definitional provisions, the court concluded that, while "[t]he Partnership is a 'taxpayer' within the meaning of the statute, * * * so [also] is each individual [partner] a separate 'taxpayer'" subject to assessment for this tax. *Id.* at 8a.

The court next concluded that the timely assessments against the partnership in this case "extended the statute of limitations only with respect to the Partnership" and "left unaltered the limitations period applicable to [respondents]." App., *infra*, 8a. Because the government did not "assess" the partnership's tax liabilities against the partners individually within three years after the partnership returns were filed, the court held that the government is now barred by Section 6501(a) from collecting those taxes from respondents. *Ibid.*

The court of appeals rejected the government's argument that assessments against the individual partners are unnecessary in this action brought to enforce the derivative, state-law liability of the partners for the valid debts of the partnership. The court acknowledged that, "under California law, partners are 'personally liable for the debts and liabilities of the partnership, including its tax liability.'" App., *infra*, 14a

(quoting *Young* v. *Riddell*, 283 F.2d 909, 910 (9th Cir. 1960)). Even though "under state law each individual partner is liable for the debts of the partnership," the court stated that "a creditor may collect a debt for which the partner is jointly and severally liable only by first obtaining a judgment against the partner." App., *infra*, 16a. The court concluded that, since "[t]he IRS has obtained no judgment against [respondents,]" and since "[t]he time for doing so has expired," the partners may not now be held liable for the tax debts of the partnership. *Ibid.*

4. In a petition for rehearing with suggestion for rehearing en banc, the government argued that the panel decision in this case conflicts with the decision of the Seventh Circuit in *United States* v. *Wright*, 57 F.3d 561 (1995). In response to the petition for rehearing, the court amended its opinion to state that "*Wright* is distinguishable because, in that case, the IRS had assessed both the partnership * * * and the individual partners." App., *infra*, 2a. The court acknowledged that the action by the government to collect taxes owed by the partnership from the individual partners in *Wright* was brought *after* the end of the limitations period that would have been applicable if the individual partners had been directly liable for the tax under federal law. *Id.* at 3a. The court nonetheless stated that, because both the partners and the partnership received assessments in *Wright*, "[t]he Seventh Circuit * * * had no opportunity to address the question before us." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals has decided an important and recurring question concerning the enforcement of partnership tax liabilities in a manner that conflicts

with decisions of other circuits. In this case, the United States made a timely assessment of federal employment tax obligations owed by a partnership. When the partnership failed to pay, the United States sought to enforce these tax liabilities against the partners who were liable under state law for all valid debts of the partnership. The court of appeals concluded, however, that, even though the United States has a valid claim against the partnership for the unpaid taxes, the United States could not enforce its derivative claim against the partners without first "assessing" the tax against the partners individually. Because the assessment of the taxes owed by the partnership had not been made directly against the partners, the court held the government's claim to be barred.

By contrast, in *Remington* v. *United States*, 210 F.3d 281, 283 (2000), the Fifth Circuit held that the United States may collect a partnership debt "from any one of the general partners" and, as a prerequisite, need only establish that the taxes are a valid "partnership debt." Similarly, in *United States* v. *Wright*, 57 F.3d 561, 564 (1995), the Seventh Circuit held that suits against partners who are "derivatively liable for taxes are timely, or not," based on whether the suit, if brought against the partnership directly, would be timely. See also *United States* v. *Updike*, 281 U.S. 489, 494-495 (1930) (timeliness of suit imposing derivative liability on a transferee depends on timeliness of suit against directly liable taxpayer).

The decision of the court of appeals in this case thus creates a conflict among the circuits on a matter of substantial and recurring importance. The Internal Revenue Service has determined that there are currently outstanding in excess of $10 billion of employment tax liabilities for partnership activities that

have been timely assessed, but for which separate assessments have not been made against partners individually. The decision of the court of appeals in this case could routinely bar collection of those liabilities from individual partners in cases in which the ordinary three-year period for the assessment of taxes in 26 U.S.C. 6501(a) has expired. The imperatives of efficient and effective federal tax collection and of national uniformity in the application of the Internal Revenue Code warrant review by this Court of the conflict created by the decision in this case.

1. The decision of the court of appeals is erroneously premised on the notion that federal law requires the United States to make separate assessments against each individual partner for the taxes owed by the partnership.

a. The court erred initially by misapprehending the nature of government's claim in this case. The government's claim in these proceedings is not brought under federal law. It is instead brought under the principles of state partnership law, which specify that "all *partners are liable* jointly and severally *for all obligations of the partnership*" (Cal. Corp. Code § 16306(a) (West 2003) (emphasis added)).[3] Under these state-law principles, it is well established that general partners are "personally liable for the debts and liabilities of the partnership, including its tax liability." *Young* v. *Riddell*, 283 F.2d 909, 910 (9th Cir. 1960). Accordingly, when (as in this case) a valid "obligation[ ] of the partnership" exists under federal law, that lawful debt of

[3] This provision is contained in Section 306(a) of the Uniform Partnership Act (1997), which has been adopted by 30 States, the District of Columbia and the Virgin Islands. 6 U.L.A. 1-2, 117 (2001).

the partnership may be enforced directly against *the partners* under state law. See *Remington* v. *United States*, 210 F.3d at 283 (under state law, "the IRS is entitled to collect the trust fund tax liability, indisputably a partnership debt, from any one of the general partners," because "[t]he partnership is the primary obligor and its partners are jointly and severally liable on its debts"); *Ballard* v. *United States*, 17 F.3d 116, 118 (5th Cir. 1994) ("it is state law that determines when a partner is liable for the obligations —including employment taxes—of his partnership"); *United States* v. *Hays*, 877 F.2d 843, 844 n.3 (10th Cir. 1989) ("the liability of a general partner for the obligations of the partnership is determined by state law rather than federal law"); *Calvey* v. *United States*, 448 F.2d 177, 180 (6th Cir. 1971) (same).[4]

b. There is no dispute in these cases (i) that timely assessments of the partnership's tax liabilities were made within the three-year period allowed by 26 U.S.C. 6501(a), (ii) that those timely assessments extended the time for collection of those liabilities for an additional ten-year period (26 U.S.C. 6502(a)), and (iii) that this ten-year period has not yet expired. See App., *infra*, 16a. It is therefore undisputed that a valid obligation of *the partnership* exists in this case.

Without directly challenging the established rule that general partners are liable for the valid debts of their partnerships under applicable state law, however, the court of appeals concluded that the taxes could not be collected from the partners in this case because they had been assessed by the IRS only against the partner-

[4] Accord, *e.g.*, *Livingston* v. *United States*, 793 F. Supp. 251 (D. Idaho 1992); *In re Ross*, 122 B.R. 462 (Bankr. M.D. Fla. 1990); *In re Robby's Pancake House*, 24 B.R. 989 (Bankr. E.D. Tenn. 1982).

ship and not directly against the partners. App., *infra*, 7a-8a. The court stated that, because no assessment was made against the partners "within the three- year period provided under § 6501(a), [that statute] bars [the government] from collecting the unpaid debts of the Partnership directly from [the partners]." App., *infra*, 8a.

This conclusion of the court of appeals is based on a fundamental misunderstanding of the function and nature of an assessment under the Internal Revenue Code. Section 6201(a) of the Internal Revenue Code authorizes the Secretary of the Treasury "to make * * * assessments of all taxes * * * imposed by this title." 26 U.S.C. 6201(a). The federal employment taxes at issue in this case are imposed on the "employer." 26 U.S.C. 3102(b), 3111(a), 3301(a), 3403. When the partnership paid wages to its employees, it thereby created employment tax liabilities for itself, as the "employer," under federal law. See *Otte* v. *United States*, 419 U.S. 43, 51 (1974); *In re Armadillo Corp.*, 410 F. Supp. 407, 410 (D. Colo. 1976), aff'd, 561 F.2d 1382 (10th Cir. 1977). The government thereafter made a timely "assessment" of those taxes within the three-year period allowed by Section 6501(a). App., *infra*, 5a. Under Section 6502(a), that timely assessment of the tax extended for ten years the period in which a judicial action could be commenced to collect that liability (26 U.S.C. 6502(a)):

> Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court * * * begun * * * within 10 years after the assessment of the tax.

This provision applies without regard to the identity of the party against whom the action is commenced. It therefore applies equally to a proceeding against a taxpayer who is directly liable for a tax and to a proceeding against a person who is only derivatively liable for the tax. Because the current "proceeding in court" to collect the assessed taxes was "begun * * * within 10 years after the assessment of the tax" (*ibid.*), it is timely as a matter of federal law under these provisions.

The court of appeals rejected this straightforward application of these statutes on the grounds that they apply only when the assessment is made "against the taxpayer" from whom the taxes are being collected. App., *infra*, 6a. That conclusion, however, has consistently been rejected by other courts. In the early decision in *Anderson* v. *United States*, 15 F. Supp. 216 (Ct. Cl. 1936), cert. denied, 300 U.S. 675 (1937), the predecessor of the Federal Circuit explained that it is incorrect to assume "that the Commissioner of Internal Revenue assesses the taxpayer instead of assessing the tax." *Id.* at 225.[5] Because it is the "tax," and not the "taxpayer," that is assessed, the court in *Anderson* held that a separate assessment is not required to collect a tax from a party who is derivatively liable for it. *Ibid.* (estate executor liable without separate assessment for taxes owed by decedent).[6] As the court explained in a

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[5] As the predecessor of the Federal Circuit, the decisions of the Court of Claims are binding precedent in that circuit. *South Corp.* v. *United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982).

[6] The assessment is a written record of the calculated amount of taxes due. The resulting "liability of the taxpayer" is to be recorded "in the office of the Secretary [of the Treasury] in accordance with rules or regulations prescribed by the Secretary." 26

companion case in *Anderson*, so long as the assessment of the "tax" was timely, "the Commissioner had six [now ten] years thereafter within which to make collection" from any person who may be liable for it. *Anderson* v. *United States*, 15 F. Supp. 225, 229 (Ct. Cl. 1936), cert. denied, 302 U.S. 695 (1937).

That same basic rule described in the *Anderson* case has been adopted and applied by numerous courts, which have stressed that a "further independent assessment [against the party derivatively liable for the tax] would accomplish nothing." *United States* v. *Dixieline Financial, Inc.*, 594 F.2d 1311, 1312 (9th Cir. 1979).[7] See also *Payne* v. *United States*, 247 F.2d 481,

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U.S.C. 6203. As the Court of Claims explained in *Anderson* v. *United States*, 15 F. Supp. at 225 (emphasis added):

> *The assessment contemplated by and referred to in the statute is the assessment by the Commissioner of the tax and the Commissioner's assessment list*, which the Commissioner actually signs when he makes an assessment of the tax, *does not contain the names of any taxpayers but contains only the amounts and the total tax* as "additional assessments' made by the Commissioner." * * * Attached to this assessment list of the Commissioner are separate sheets for use by the collector in keeping his record of collections, credits, and balances due on which is written the name of the person or corporation in respect of whose taxes the amount stated on the Commissioner's assessment list has been assessed.

The designation on supplementary sheets "of the person in respect of whose income a tax was assessed or the person from whom collection should be made is for the information and guidance of the collector." *Anderson* v. *United States*, 15 F. Supp. at 228.

[7] The Ninth Circuit has held in analogous situations that, when the IRS makes a timely assessment of employment taxes against an employer, that assessment is sufficient by itself to extend the time for bringing suit to recover the derivative liability of a lender under Section 3505 of the Code. The lender's derivative liability

484 (8th Cir. 1957) (limitations period for suit claiming derivative liability of a transferee extended for six [now ten] years after assessment of the tax even though "no assessment * * * had ever been made" against the transferee), cert. denied, 355 U.S. 923 (1958); *United States* v. *Walker*, 217 F. Supp. 888, 890 (W.D.S.C. 1963) (for a collection action to proceed against a derivatively liable party, "[t]he Commissioner is required to assess the tax * * * rather than assess the taxpayer").

The Tenth Circuit reached this same conclusion in *United States* v. *Botefuhr*, 309 F.3d 1263 (2002). In that case, the government sought to collect a gift tax from the donee who was derivatively liable for the tax only

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for employment taxes closely parallels the derivative liability of a partner under state law. Under Section 3505(a), a lender that pays wages directly to the employees of another employer is liable itself for the amount of taxes required to be deducted and withheld from the wages. 26 U.S.C. 3505(a). Under Section 3505(b), a lender is also liable if it supplies funds to an employer for the specific purpose of paying wages "with actual notice or knowledge * * * that such employer does not intend to or will not be able to make timely payment" of the requisite withholding taxes. 26 U.S.C. 3505(b). The lender's liability, like the partner's liability for partnership employment taxes, is derivative because it arises when the employer has failed to pay the taxes imposed. In decisions that were not explained or even discussed by the panel in this case, the Ninth Circuit has held that an assessment of liability against the employer is sufficient to extend the limitations period for filing suit against the lender on its derivative liability for the tax. *United States* v. *Dixieline Financial, Inc.*, 594 F.2d at 1313 ("the assessment of the tax against [Framing Systems], the employer, met the requirements of § 6501(a); no assessment of the § 3505(b) liability of [the lender] was required"); *United States* v. *Hunter Engineers & Constructors, Inc.*, 789 F.2d 1436, 1441 (9th Cir. 1986) ("[t]he assessments against [the employer] served to extend the statute of limitations against [the lender] so that this suit was timely filed"), cert. denied, 479 U.S. 1063 (1987).

"to the extent of the value of such gift" (26 U.S.C. 6324(b)).[8] The court rejected the argument of the donee that he was relieved of liability because an assessment had not been made directly against him. The court explained that a timely "assessment" of the tax had been made against the donor (who was primarily liable) and that, since "the suit would be timely brought against the donor under these provisions, it will be considered timely against the donee or transferee" even though no separate assessment had been made against him. 309 F.3d at 1277-1278. "[B]ecause the IRS is acting within the time period in which it could act against the donor, * * * its case against [the derivatively liable] donee is timely." *Id.* at 1278.

This Court reached an analogous conclusion in *Leighton* v. *United States*, 289 U.S. 506 (1933), which involved the derivative liability of a transferee of corporate assets for taxes owed by the corporation. The Court held that the right of the United States to enforce this derivative liability is based on the assessment against the primarily liable corporation and exists even "without assessment" of the tax against the parties whose liability was only derivative. *Id.* at 508-509. In *United States* v. *Updike*, 281 U.S. 489, 494 (1930), the Court similarly concluded that, because the tax imposed on the corporation "is the basis of the liability" of the transferee, the same limitations period that applies in a suit to collect from the directly liable corporation also applies in a suit against the derivatively liable transferee.

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[8] The Internal Revenue Code imposes primary liability for the federal gift tax upon the donor. 26 U.S.C. 2502(c). If the donor fails to pay the tax, however, the donee is personally liabile for the tax to the extent of the value of the gift. 26 U.S.C. 6324(b).

In the present case, the court of appeals ignored this substantial body of precedent in holding that "the assessment of tax liability against the Partnership, without more, does not allow the IRS to collect those taxes directly from the individual partners." App., *infra*, 14a. As the Seventh Circuit recently summarized in *United States* v. *Wright*, 57 F.3d 561, 564 (1995), "suits against persons derivatively liable for taxes are timely, or not, according to the rules for timeliness * * * against [the primarily liable] taxpayers." The government's collection action in this case is thus timely because it was brought "within 10 years after the assessment of the tax." 26 U.S.C. 6502(a)(1).

c. The court of appeals erred in suggesting that the United States could not prevail in a claim against the partners under state law. The court relied for this proposition on Section 16307(c) of the California Corporations Code, which specifies that "a judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner." Cal. Corp. Code § 16307(c) (West 2003). The court noted that the IRS had not yet obtained a judgment against respondents, and it opined that "it is too late to do so [now] because the applicable [federal] statute of limitations [in 26 U.S.C. 6501(a)] was three years" and that term has now expired. App., *infra*, 17a.

As the decisions of the Federal Circuit, Seventh Circuit, Eighth Circuit and Tenth Circuit described above all make clear, however, the timely assessment of the employment tax liability permits an action to collect that tax against any primarily or derivatively liable party "by a proceeding in court * * * begun * * * within 10 years after the assessment of the tax." 26 U.S.C. 6502(a)(1). Because the government's collection

action in this case was brought against the partners "within 10 years after the assessment of the tax" (*ibid.*), it is timely.

d. The court of appeals erred in concluding (App., *infra*, 13a-14a) that the decision in this case does not conflict with the decision of the Seventh Circuit in *United States* v. *Wright*, 57 F.3d 561 (1995). In *Wright*, as in the present case, the court addressed the statute of limitations that governs an action to collect a partner's derivative liability for unpaid federal employment taxes incurred by a partnership. The question in that case, like in the present one, was "whether, if a suit against the taxpayer would be timely, then suit is also timely against persons derivatively liable." *Id.* at 564. The answer to that question in *Wright* directly conflicts with the answer given to that same question by the court below (*ibid.*):[9]

> [S]uits against persons derivatively liable for taxes are timely, or not, according to the rules for timeliness of suits against taxpayers. It is hard to escape that conclusion, for both [26 U.S.C.] § 6502 and § 6503 establish rules for suing taxpayers; they do not set up separate periods for persons secondarily liable. Their structure presumes that there is only one period per tax *debt*, no matter how many different persons may be liable on the debt.

[9] The district court and Seventh Circuit opinions in *Wright* belie the assertion of the court below that "*Wright* is distinguishable because * * * the IRS had assessed both the partnership * * * and the individual partners." App., *infra*, 13a. The government had maintained in *Wright* that "the assessments were levied against the partnership only and not against any of the partners individually." 868 F. Supp. 1070, 1071 n.1 (S.D. Ind. 1994). The district court in *Wright* "made clear" that, although it appeared that an assessment had been entered against the partners as well as against the partnership, that question was "not material to the resolution" of the case. *Ibid.* The Seventh Circuit also did not suggest that the existence of assessments against the partners would be relevant in that case. See 57 F.3d at 562-563. To the contrary, in a holding that directly conflicts with the decision in this case, the court concluded that "suits against persons derivatively liable for taxes are timely, or not, according to the rules for timeliness of suits against taxpayers." *Id.* at 564.

Other circuits have agreed that actions to enforce derivative liabilities for taxes are based upon, and subject to the rules applicable to collection of, the taxes assessed against the primarily liable taxpayer. *United States* v. *Botefuhr*, 309 F.3d at 1277; *Anderson* v. *United States*, 15 F. Supp. at 225. The contrary holding in this case—that "the IRS cannot collect a partnership's tax deficiency directly from the partners without first making individualized assessments against the partners" (App., *infra*, 4a)—thus creates a conflict among the circuits on a matter of recurring importance.

2. This Court has stressed the importance of avoiding "inequalities in the administration of the revenue laws." *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948). The decision of the court below, however, would cause different rules to be applied in different circuits on the basic question of partnership tax liability presented in this case. The result would be a disparate treatment of similarly situated taxpayers based solely upon the happenstance of geography. Indeed, since partners may reside in different circuits, two partners of the *same* partnership may receive different treatment—one liable for partnership taxes and one not—due to the conflict among the circuits created by the decision in this case. Resolution of this conflict by this Court is warranted by the overriding importance, in a national system of taxation, of "ensur[ing] as far as

possible that similarly situated taxpayers pay the same tax." *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 544 (1979).

The Internal Revenue Service has determined that there are currently outstanding partnership employment tax liabilities in excess of $10 billion that have been timely assessed but for which separate assessments have not been made against partners individually. The decision of the court below would routinely bar collection of those liabilities from individual partners in cases in which the ordinary three-year period for assessment of taxes in 26 U.S.C. 6501(a) has expired.

It is undisputed that, under applicable principles of state law, general partners are ordinarily jointly and severally liable for *all* outstanding debts of the partnership. See note 3, *supra*. Until now, the IRS has ordinarily pursued collection of partnership tax obligations from the partnerships before commencing litigation with partners to satisfy outstanding tax obligations. Under the abbreviated limitations period that would result from the decision in this case, however, the government would be forced to bring collection suits against partners within the three-year period of Section 6501(a) even though parallel efforts against the partnership may remain ongoing. Such duplicative proceedings would be burdensome for taxpayers as well as for the government, for they would subject partners to the necessity of litigation over matters that the partnership should routinely resolve. The decision of the court of appeals thus creates inefficiencies and obstacles for the routine collection of partnership tax liabilities and places in jeopardy the collection of large sums of outstanding taxes already assessed.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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MARCH 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-55953
D.C. No. CV-00-00753-VAP

IN RE ABEL COSMO GALLETTI, AKA AL GALLETTI, AND SARAH GALLETTI, DEBTORS

UNITED STATES OF AMERICA, ON BEHALF OF ITS AGENCY, THE INTERNAL REVENUE SERVICE, APPELLANT

v.

ABEL COSMO GALLETTI; SARAH GALLETTI, APPELLEES

No. 01-55954
D.C. No. CV-00-00842-VAP

IN RE FRANCESCO BRIGUGLIO, AKA FRANK BRIGUGLIO, AND ANGELA BRIGUGLIO, AKA ANGIE BRIGUGLIO, DEBTORS

UNITED STATES OF AMERICA, APPELLANT

v.

FRANCESCO BRIGUGLIO, AKA FRANK BRIGUGLIO; ANGELA BRIGUGLIO, AKA ANGIE BRIGUGLIO, APPELLEES

Appeals from the United States District Court for the Central District of California Virginia A. Phillips, District Judge, Presiding

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Argued and Submitted
May 9, 2002—Pasadena, California

Filed Aug. 8, 2002
Amended Nov. 20, 2002

ORDER AND AMENDED OPINION

Before: KLEINFELD and GRABER, Circuit Judges, and BOLTON*, District Judge.

The opinion filed August 8, 2002, 298 F.3d 1107, is amended as follows:

On slip opinion page 11556, just before the summary paragraph, add the following two paragraphs:

> In its petition for rehearing, the IRS asserts that the Seventh Circuit has held that the IRS can bring suit against individual partners, and obtain a judgment against them, for as long as the tax obligations remain a valid debt of the partnership, citing *United States v. Wright*, 57 F.3d 561 (7th Cir. 1995). *Wright* is distinguishable because, in that case, the IRS had assessed both the partnership (Empire Wood Company) and the individual partners. *United States v. Wright*, 868 F. Supp. 1070, 1071 & n.1 (S.D. Ind. 1994). Those assessments extended to six years the

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* The Honorable Susan R. Bolton, United States District Court for the District of Arizona, sitting by designation.

statute of limitations with respect to both the partnership and the pa s. By contrast, here, no assessment was ma gainst the individual partners.

Subsequently, the Empire Wood partnership filed for bankruptcy protection and entered a period of reorganization, thus tolling of the statute of limitations as to the partnership. *Wright*, 57 F.3d at 562. *See* 26 U.S.C. § 6503(h) (tolling the statute of limitations during the period in which the Bankruptcy Code prohibits the government from pursuing a collection action). More than six years after the initial tax assessment but before the end of the limitations period applicable to the partnership, the IRS brought an action against the individual partners to collect the unpaid taxes. *Wright*, 57 F.3d at 562-63. The partners argued that, although an action against the partnership would have been timely, the statute of limitations had expired as to them because it had not been tolled during the period of the partnership's bankruptcy. *Id.* Accordingly, the only relevant question in *Wright* was whether the statute of limitations applicable to the partners should be tolled while the limitations period was tolled with respect to the partnership. The Seventh Circuit therefore had no opportunity to address the question before us.

With this amendment, the panel has voted to deny the petition for rehearing. Judges Kleinfeld and Graber have voted to deny the petition for rehearing en banc, and Judge Bolton has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED. No further petitions for rehearing or rehearing en banc may be filed.

OPINION

GRABER, Circuit Judge.

Debtors Abel Cosmo Galletti, Sarah Galletti, Francesco Briguglio, and Angela Briguglio filed Chapter 13 bankruptcy petitions. The United States Internal Revenue Service (IRS) filed proofs of claim against Debtors for unpaid employment taxes assessed against a partnership in which Debtors were general partners. The bankruptcy court disallowed the IRS's claims, and the district court affirmed. We also affirm. The IRS's claims were properly disallowed because (1) the IRS cannot collect a partnership's tax deficiency directly from the partners without first making individualized assessments against the partners or obtaining judgments against the partners holding them jointly and severally liable for the partnership's tax debts; and (2) the statute of limitations now bars the IRS from making such individual assessments or obtaining such judgments.

FACTUAL AND PROCEDURAL BACKGROUND

Debtors were general partners of Marina Cabrillo Partners (the Partnership). From 1992 to 1995, the Partnership failed to pay the requisite amount of

federal employment taxes, prompting the IRS to assess those unpaid taxes against the Partnership in 1994, 1995, and 1996.

On October 20, 1999, Debtors Abel and Sarah Galletti filed a joint petition for relief under Chapter 13 of the Bankruptcy Code. Debtors Francesco and Angela Briguglio filed a joint petition under Chapter 13 on February 4, 2000. In the course of those bankruptcy proceedings, the IRS filed proofs of claim against all Debtors for the unpaid taxes that the IRS had assessed against the Partnership. Debtors objected to the claims on the ground that the IRS had assessed only the Partnership and not the individual partners and that the statute of limitations for assessment had run. The IRS conceded that it had not assessed Debtors within the usual three-year limit, 26 U.S.C. § 6501, but argued that its timely assessments against the Partnership extended the time for collection of the taxes from Debtors, 26 U.S.C. § 6502(a). The bankruptcy court sustained Debtors' objections in two separate orders.

The IRS timely appealed those orders. The district court affirmed, and the IRS filed timely notices of appeal. We consolidated the two appeals.

STANDARD OF REVIEW

We review de novo the district court's decision on an appeal from a bankruptcy court. *Neilson v. Chang* (*In re First T.D. & Inv., Inc.*), 253 F.3d 520, 526 (9th Cir. 2001) (citing *Gruntz v. County of Los Angeles* (*In re Gruntz*), 202 F.3d 1074, 1084 n.9 (9th Cir. 2000) (en banc)). We review the bankruptcy court's conclusions of law de novo and its factual findings for clear error. *Id.* (citing *Beaupied v. Chang* (*In re Chang*), 163 F.3d 1138, 1140 (9th Cir. 1998)).

DISCUSSION

In order to collect unpaid taxes from a taxpayer, the IRS must, within three years after the filing of the taxpayer's return, either assess the tax against the taxpayer or bring an action to collect the tax. 26 U.S.C. § 6501(a). Here the IRS did neither. Nonetheless, it seeks to collect unpaid taxes from Debtors by way of proofs of claim in their bankruptcy proceedings. The IRS offers two theories to justify its filing of these claims against Debtors. First, the IRS argues that its timely assessment of taxes against the Partnership allows it to collect taxes directly from the individual partners even though no separate assessment of tax liability was made against them. Second, the IRS argues that, because California law makes partners jointly and severally liable for the debts of the partnership, the IRS could bring a state-law action against Debtors to collect the tax liability assessed against the Partnership. Neither theory gives rise to an allowable bankruptcy claim in the circumstances of this case.

A. *Assessment of the Partnership*

As noted, the IRS may collect tax deficiencies from a taxpayer by making an assessment against the taxpayer within three years of the filing of the taxpayer's return. 26 U.S.C. §§ 6203, 6501(a). By assessing a tax deficiency, the IRS gains advantages in its collection efforts. For example, assessment extends the statute of limitations for a judicial action to collect the tax liability to ten years from the date of the assessment. 26 U.S.C. § 6502(a).[1] Similarly, because a final assessment operates in much the same way as a judgment, the IRS may proceed directly against the assets of a taxpayer whose tax deficiency has been properly assessed. *Id.*[2]

[1] Title 26 U.S.C. § 6502(a) provides, in relevant part:

> Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—
>
> (1) within 10 years after the assessment of the tax[.]

[2] Alternatively, so long as the IRS brings an action to collect the taxes within three years after the taxpayer's return was filed, an assessment is unnecessary. 26 U.S.C. § 6501(a); *Goldston v. United States* (*In re Goldston*), 104 F.3d 1198, 1200-01 (10th Cir. 1997). The IRS filed no action to collect taxes, either against the Partnership or against Debtors.

The IRS made a timely assessment against the Partnership for unpaid employment taxes. The IRS argues that Debtors, as partners, are not separate "taxpayers" within the meaning of the statutory provisions governing assessment and collection of taxes. It follows, says the IRS, that the timely assessment against the Partnership allows the IRS to collect taxes directly from the individual partners. We are not persuaded.

1. *Statutory Provisions*

Section 6203 of the Internal Revenue Code provides that an "assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary." 26 U.S.C. § 6203. As defined under the code, a "taxpayer" is "any person subject to any internal revenue tax," and a "person" includes "an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(a)(14), (a)(1).

As noted, an "individual" is included in the statutory definitions of "person" and "taxpayer" in § 7701 and, by

extension, in §§ 6203 and 6501. An "individual" can be a partner but is distinct from a "partnership." The regulation interpreting § 6203 provides that a valid assessment "shall provide identification of *the taxpayer*." 26 C.F.R. § 301.6203-1 (emphasis added). Section 6502, which governs collection of tax after an assessment has been made, likewise presumes that "the taxpayer" against whom a deficiency has been assessed is the same taxpayer for whom the statute of limitations is extended. In all these statutes, the individual or entity assessed must be a separately identified "taxpayer."

The Partnership is a "taxpayer" within the meaning of the statute, but so is each individual Debtor a separate "taxpayer." Each has its, his, or her own taxpayer identification number. Thus, the IRS's failure to assess tax deficiencies against Debtors within the three-year period provided under § 6501(a) bars it from collecting the unpaid debts of the Partnership directly from Debtors. The assessment against the Partnership extended the statute of limitations only with respect to the Partnership, but it left unaltered the limitations period applicable to Debtors. Because the bankruptcy court may disallow claims that are "unenforceable against the debtor and the property of the debtor," 11 U.S.C. § 502(b)(1), the court did not err in sustaining Debtors' objections to the IRS's claims.

2. *Case Law*

Although no published Ninth Circuit decision directly addresses the question before us, our precedents weigh against the IRS's position.

The IRS argues that we should follow *Young v. Riddell*, 60-1 U.S. Tax Cas. (CCH) ¶ 9831, at 76,049

(S.D. Cal. 1959), *aff'd* 283 F.2d 909 (9th Cir. 1960).[3] In that case, the IRS had assessed unpaid taxes against a partnership called the "Riviera Room." *Id.* at 76,054. One of the general partners paid his share of the taxes but later brought an action for a refund. *Id.* at 76,050. The district court held that the partner was not entitled to a refund:

> Where taxes are assessed against a partnership and under state law each member of the partnership is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability; their liability arises as a matter of state law.

Id. at 76,054. Although the government had not made a valid assessment against the partner, the court refused to order a refund because state law made the partner substantively liable for taxes assessed against the partnership.

The district court's holding in *Young* was more limited than the IRS suggests. The court did not hold that the government would have been entitled to *collect* the same tax in the absence of an individual assessment, a judgment against the partner, or a voluntary payment. In fact, other portions of the court's opinion demonstrate that the opposite is true:

> It is the government's contention that where an assessment names an entity such as in the instant case, that it is unnecessary to name the individual

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[3] We discuss the district court's opinion in *Young* at some length, to respond to the IRS' contentions and to provide context for our own opinion in *Young*.

> members of the entity in order to establish individual liability and that *the only reason for naming such individual or adding such individuals' names as here is to enable collection of the tax without resorting to court action. With this contention I agree* . . . .

Id. at 76,050 (emphasis added). Thus, the court acknowledged that to *collect* the tax for which the partner was liable, the IRS would have had to either resort to court action or individually assess the taxes against the partner. An assessment was unnecessary only because the tax already had been collected. *Id.* at 76,054. The district court's holding, therefore, was much narrower than the IRS acknowledges, namely, that "[a] person liable for taxes *may not recover a refund of taxes* he paid because of the fact the assessment did not name him." *Id.* at 76,054 (emphasis added).

Our affirmance of the district court's decision in *Young* did not reject the district court's interpretation. *Young v. Riddell*, 283 F.2d 909 (9th Cir. 1960). Only one passage in our opinion lends any support to the IRS's position: "Having been found a general member of the partnership, appellant is personally liable for the debts and liabilities of the partnership, including its tax liability, even though his status as a partner was not discovered or formally noted in tax records until after termination of the partnership." *Id.* at 910. That statement does not aid the IRS, however, as it merely restates the holding of the district court that the partner was not entitled to a refund because he was liable for the debts of the partnership under state law. Nothing in our opinion contradicts the district court's suggestion that the IRS could not have *collected* the tax against the partner had he refused to pay it.

Thus, ultimately our opinion in *Young* supports Debtors' position because their *liability* for the tax assessed against the Partnership is not at issue in this case. To the contrary, Debtors concede that they are liable for the tax but argue only that, in the absence of individual assessments or judgments against them, the IRS is procedurally barred from *collecting* the unpaid taxes from them.

The foregoing limited interpretation of *Young* is buttressed by *United States v. Coson*, 286 F.2d 453 (9th Cir. 1961). In that case, the IRS assessed unpaid taxes against a partnership and later claimed a lien against the property of Coson, who allegedly was a general partner. *Id.* at 454. Coson challenged the validity of the lien on a number of grounds, including that the assessment against the partnership did not name him individually. *Id.* at 458; *Coson v. United States* 169 F. Supp. 671, 675 (S.D. Cal. 1958) (The "plaintiff does not seek to contest the correctness of an assessment; instead, he contends there just never was any assessment of the taxes in question against him.").

The district court, pointing to § 6203 and its implementing regulations, noted that one of the requirements for a valid assessment was that the taxpayer be identified. *Id.* Further, it noted that the assessment at issue named only the partnership and "an unknown number of unidentified taxpayers." *Id.* Relying on the fact that Coson had never been assessed individually, the district court held that the IRS's attempts to collect the unpaid taxes from Coson were improper:

> "[T]his court is of the opinion that such a lien does not exist against a particular individual's property pursuant to § [§] 6321 and 6322 unless the underly-

ing tax obligation has been assessed against him under § 6203.

Since plaintiff never was assessed and no lien exists without such an assessment, it follows that the Government does not have any lien."

Id. at 676 (footnote omitted).[4]

On appeal, we affirmed. We relied on a different ground than the district court had used, namely, that the lien was procedurally defective for reasons other than the government's failure to timely assess the tax against Coson. *Coson*, 286 F.2d at 458, 462-63. Nonetheless, in a passage that supports Debtors' position in dictum, we noted:

In holding as we do that the lack of proper notice or demand was fatal to the acquisition of the Government's lien against Coson, the emphasis here is somewhat different than that employed by the trial judge who held that the assessment itself was void as against Coson because the taxes were never assessed to Coson, the record of assessment in the office of the Bureau making no reference whatever to Coson. The Government argues that there is no requirement that an assessment be made against any person. Although our decision as to the lack of proper notice or demand is sufficient to dispose of this case, it would appear that *the trial court was right in holding the assessment was insufficient for failure to comply with the statutory requirements.*

[4] The IRS attempts to distinguish this case on the ground that Coson was challenging the validity of a lien on his property, while no lien is challenged here. However, the asserted lien was a tax lien, the validity of which depended on an underlying assessment.

Id. at 464 (emphasis added).

In its petition for rehearing, the IRS asserts that the Seventh Circuit has held that the IRS can bring suit against individual partners, and obtain a judgment against them, for as long as the tax obligations remain a valid debt of the partnership, citing *United States v. Wright*, 57 F.3d 561 (7th Cir. 1995). *Wright* is distinguishable because, in that case, the IRS had assessed both the partnership (Empire Wood Company) *and* the individual partners. *United States v. Wright*, 868 F. Supp. 1070, 1071 & n.1 (S.D. Ind. 1994). Those assessments extended to six years the statute of limitations with respect to both the partnership and the partners. By contrast, here, no assessment was made against the individual partners.

Subsequently, the Empire Wood partnership filed for bankruptcy protection and entered a period of reorganization, thus tolling of the statute of limitations as to the partnership. *Wright*, 57 F.3d at 562. *See* 26 U.S.C. § 6503(h) (tolling the statute of limitations during the period in which the Bankruptcy Code prohibits the government from pursuing a collection action). More than six years after the initial tax assessment but before the end of the limitations period applicable to the partnership, the IRS brought an action against the individual partners to collect the unpaid taxes. *Wright*, 57 F.3d at 562-63. The partners argued that, although an action against the partnership would have been timely, the statute of limitations had expired as to them because it had not been tolled during the period of the partnership's bankruptcy. *Id.* Accordingly, the only relevant question in *Wright* was whether the statute of limitations applicable to the partners should be tolled while the limitations period was tolled with respect to

the partnership. The Seventh Circuit therefore had no opportunity to address the question before us.

In summary, we hold that the assessment of tax liability against the Partnership, without more, does not allow the IRS to collect those taxes directly from the individual partners.

B. *California Partnership Law*

In an attempt to avoid the time-bar on assessments, the IRS argues in the alternative that it was not required to make individual assessments against Debtors because they are jointly and severally liable for the debts of the Partnership under California law. This argument overreaches under state law.

Superficially, the IRS's argument is logical. The IRS assessed unpaid employment taxes against the Partnership in 1994, 1995, and 1996. Therefore, under federal law, the IRS has a right to bring proceedings against the Partnership to collect those taxes for up to ten years after assessment, in this case until 2004, 2005, and 2006. 26 U.S.C. § 6502(a)(1). Under California law, general partners such as Debtors are "liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law." Cal. Corp. Code § 16306(a); *see also Young*, 283 F.2d at 910 (holding that, under California law, partners are "personally liable for the debts and liabilities of the partnership, including its tax liability"). Because the assessed employment taxes are a debt of the Partnership that the IRS has a right to collect against it, the IRS asserts that it may bring an action under state law to obtain a judgment holding Debtors responsible for the unpaid taxes. Cal. Corp. Code § 16307(b); *see also Remington v. United States*, 210 F.3d 281, 282-83 (5th

Cir. 2000) (holding that, under the Texas Uniform Partnership Act, the government was "entitled to collect the . . . tax liability, indisputably a partnership debt, from any one of the general partners"); *United States v. W. Prods., Ltd.*, 168 F.Supp.2d 84, 91 (S.D. N.Y. 2001) (allowing government to collect withholding taxes from general partner under the New York Partnership Law even though the assessments were made in the name of the partnership); 14 Mertens, The Law of Federal Income Taxation § 55:109 (West 2002) (stating that the government may bring an action to "collect the withholding taxes from one or more general partners under the applicable state partnership laws"). The Bankruptcy Code permits a creditor to make a claim against the estate of a debtor so long as the creditor has a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). Such a claim may be disallowed by the bankruptcy court only if it "is unenforceable against the debtor and property of the debtor, under . . . applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1). The IRS argues that, at the time Debtors' petitions were filed, its state-law claim against Debtors for the tax liability of the Partnership was not unenforceable and, therefore, the bankruptcy court erred as a matter of law by disallowing the claim.

Under California law, however, a creditor may not automatically collect from a general partner a debt that the partnership owes to the creditor. To the contrary, the creditor must first obtain a judgment against the partner holding the partner liable for the partnership's

debt: "A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner." Cal. Corp. Code § 16307(c); 9 B.E. Witkin, Summary of California Law § 60V (9th ed. Supp. 2001) ("[A]lthough a partner need not be named individually in an action against a partnership, the partner must be individually named and served in the action or in a later suit, and judgment entered against that partner, in order to reach the partner's personal assets."). Thus, although under state law each individual partner is *liable* for the debts of the partnership, a claim against the partnership does not automatically give rise to a right to *collect* against the individual partners. Instead, a creditor may collect a debt for which the partner is jointly and severally liable only by first obtaining a judgment against the partner.

The IRS has obtained no judgment against Debtors. The time for doing so has expired. 26 U.S.C. § 6501(a). As we have explained, the assessment extended the statute of limitations only as to the Partnership.

CONCLUSION

The assessment against the Partnership was not an assessment against the individual partners (Debtors), because they are separate taxpayers. Consequently, the assessment against the Partnership extended the statute of limitations (to ten years from the date of assessment) only for the Partnership; it had no effect on the ordinary three-year statute of limitations for Debtors.

California partnership law does not aid the IRS because, under state law, a creditor may not collect a

partnership debt from an individual partner without first obtaining a judgment against the partner. The IRS did not obtain a judgment against Debtors, and it is too late to do so because the applicable statute of limitations was three years.

Thus, the IRS does not have allowable bankruptcy claims under either of its theories. Accordingly, we affirm the bankruptcy court's disallowance of the claims.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT,
CENTRAL DISTRICT OF CALIFORNIA

No. EDCV 00-00753-VAP

UNITED STATES OF AMERICA, ON BEHALF OF ITS AGENCY, THE INTERNAL REVENUE SERVICE, PLAINTIFF

v.

ABEL COSMO GALLETTI, AKA AL GALLETTI AND SARAH GALLETTI, DEFENDANTS

Filed: Mar. 23, 2001

MEMORANDUM OPINION AND ORDER

PHILLIPS, District J.

The Court has received and considered all papers filed in conjunction with Appellant's Appeal of the United States Bankruptcy Court Order. The Appeal is appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7. For the reasons set forth below, the Order of the Bankruptcy Court is AFFIRMED.

I. BACKGROUND AND PROCEDURAL HISTORY

Abel Cosmo Galletti[1] and Sarah Galletti ("Debtors") were general partners of Marina Cabrillo Partners ("Partnership").[2] [*See* Appellant's Opening Brief ("Appellant's Br.") at 1.] On October 20, 1999 the Debtors filed a joint voluntary chapter 13 petition. [Appellant's Br. at 4.] The Internal Revenue Service ("IRS") filed a proof of claim in the amount of $395,179.89 ("claim"). [*Id.*] The claim consists of the following: 1) secured claims totaling $395,006.37 for taxes assessed between January, 1994 and July, 1995 against the Partnership (taxpayer assessment number 86-0641090); 2) an unsecured priority claim in the amount of $160.36 for taxes assessed on December 4, 1995 against the Partnership; and 3) an unsecured general claim in the amount of $13.16 for penalties against the unsecured priority claim. [Appellant's Br. at 5-6; Appellant's Excerpt of Record ("Record"), Ex. 7 (Bankruptcy Court Order ("Sept. 11, 2000 Order")).]

Debtors filed an objection to the IRS claim on April 17, 2000. [*See* Record, Ex. 1 (Debtors' objection).] Debtors argued that the claim should not be allowed as it was a claim assessed against the Partnership and was not a proven claim against the estate. [Sept. 11, 2000 Order at 2.] Specifically, Debtors argued that while there were jointly and severally liable for the Partnership's debts, the claim must be individually assessed before it could be collected against them. [*Id.*]

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[1] A.k.a Al Galletti.

[2] This case raises the same issues as those in *In re Briguglio*, [2001-1 USTC ¶50,360], 2001 U.S. Dist. LEXIS 4829, 00-00842-VAP, and involves the same Partnership. Debtors' social security numbers are 379-34-6851 (Mr. Galletti) and 371-42-5311 (Ms. Galletti).

A. BANKRUPTCY COURT RULING

This matter went before the bankruptcy court on July 31, 2000. In a September 11, 2000 Order the court found for the Debtors. [Sept. 11, 2000 Order at 1.]

Neither party disputed that under California law all partners are jointly and severally liable for the debts of a partnership. The main issue before the court was whether or not the tax assessments against the Partnership were effective to bind the Debtors as partners and whether or not the collection itself was barred by the statute of limitations. [Sept. 11, 2000 at 6.]

The Court held that under the Internal Revenue Code ("Code"), to be held liable for tax obligations, a taxpayer must be validly assessed. [Sept. 11, 2000 Order at 8 (citing IRS-Code § 6203).] Under the Code, a valid assessment is made by recording the liability of the "taxpayer" in the office of the Secretary. [*Id.*; *See* § 6203.] A "taxpayer" is defined as "any person subject to any internal revenue tax." [*Id.*; *See* § 7701(a)(14).] A "person" includes "an individual, a trust, estate, partnership, association, company, or corporation." [*Id.*] The definitions of "taxpayer" or "person" do not include "partner" or "general partner." [Sept. 11, 2000 Order at 9.] The court found, however, that a general partner may be an "individual" subject to taxation. Under these definitions a partner "must be assessed individually under § 6203 before he can be held liable." [*Id.*] The court concluded, "therefore, contrary to the IRS's argument, a partner must be assessed individually under § 6203 before he can be held liable." [*Id.*]

As the Court required the Debtors to be assessed individually, under the Code's three year statute of limitations, the 1992 to 1995 claims against the Debtors

as individual partners were time-barred.[3] [Sept. 11, 2000 Order at 11; Code § 6501(a).] The Debtors as individual partners were not assessed within the three year statute of limitations, and therefore collection was barred. [*Id.*]

The IRS ("Appellant") filed an Appeal on November 24, 2000. The Debtors filed Opposition on December 21, 2000. Appellant filed a Reply on January 2, 2001.

II. STANDARD OF REVIEW

A reviewing court reviews a bankruptcy court's conclusions of law *de novo*. *See Siriani v. Northwestern Nat'l Ins. Co.*, 967 F.2d 302, 303-04 (9th Cir.1992). Findings of fact are reviewed for clear error. *See id.* The bankruptcy court's choice of remedies is reviewed for an abuse of discretion, since it has broad equitable remedial powers. *See In re Goldberg*, 168 B.R. 382, 384 (9th Cir.1994). A bankruptcy court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L.Ed.2d 359 (1990). Under this standard, "a reviewing court cannot reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *In re Sunnymead Shopping Center Co.*, 178 B.R. 809, 814 (9th Cir. 1995) (citing *Goldberg*, 168 B.R. at 384).

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[3] The court noted that in this case the proof of claim is the equivalent of a lien. [Sept. 12, 2000 Order at 6.]

III. DISCUSSION

A. ISSUES ON APPEAL

1. STATUTORY ANALYSIS

Appellant disputes the bankruptcy court's interpretation of the applicable code sections. [*See* Appellant's Reply Brief ("Reply") at 2.] It argues that a general partner is within neither the statutory definition of "taxpayer" nor "person," and is not an "individual" as the bankruptcy court found. [*Id.*] Appellant claims that defining "individual" to include a general taxpayer would produce absurd results, but offers no authority to support this contention. [Reply at 3.]

Appellant argues that requiring separate assessment of partners would be unconstitutional because it would require the IRS to assess the liability of a general partner premised on state law. [Reply at 4.] It is well-established, however, that state law definitions determine liability, especially in the area of partnership law.

The United States Supreme Court has long held that, although the consequences that attach to property interests is a matter left to federal law, the definition of underlying property interests is left to state law. *See United States v. Mitchell* [71-1 USTC ¶ 9451], 403 U.S. 190, 205, 91 S. Ct. 1763, 1771, 29 L.Ed.2d 406 (1971) (finding state law determines income attributable to wife as community property); *Aquilino v. United States* [60-2 USTC ¶ 9538], 363 U.S. 509, 513-515, 80 S. Ct. 1277, 1280-1281, 4 L.Ed.2d 1365 (1960) (holding attachment of federal lien depends on whether "property" or "rights to property" exist under state law but priority of federal lien depends on federal law); *see also Pahl v. C.I.R.* [98-2 USTC ¶ 50,602], 150 F.3d 1124, 1128 (9th

Cir. 1998) ("Courts look to the tax statutes and interpreting cases to determine what interest is sufficient to trigger tax liability, and to state law to determine whether the taxpayer had such an interest."); *Ballard v. United States* [94-1 USTC ¶ 50,152], 17 F.3d 116, 118 (5th Cir. 1994) ("Although federal law defines partnerships for purposes of applying the partnership income taxation scheme . . . it is state law that determines when a partner is liable for the obligations—including employment taxes—of his partnership."); *United States v. Hays* [89-2 USTC ¶ 9570], 877 F.2d 843, 844 n. 3 (10th Cir. 1989) ("Courts have assumed that the liability of a general partner for the tax obligations of the partnership is determined by state law rather than federal law."). While the bankruptcy court determined liability according to California law, it based the requirement of an individual assessment on an interpretation of federal code. [Sept. 12, 2000 Order at 8.] Such analysis comports with the analysis of both circuit courts and the Supreme Court.

Appellant analyzes Internal Revenue Code section 3403 in the context of other sections imposing liability on third partes. [Reply at 4.] Appellant argues that if Congress had intended to require individual assessment of general partners, Congress would have enacted a provision requiring such assessment. [*Id.*] While Appellant cites one example of a Code section requiring assessment (section 6627(a)) and one example of a Code section in which assessment is not mentioned or required (section 3505(a)), Appellant still offers no authority stating that a court cannot, based on statutory definition and caselaw, find that individual assessment is required. [*See* Reply at 5.]

Accordingly, Appellant cites no compelling reason, nor authority to substantiate, why it was error for the bankruptcy court, in interpreting the statute, to read "individual" as including individuals who are general partners of partnerships.

2. THE BANKRUPTCY COURT'S ANALYSIS OF RELEVANT CASELAW

a. *YOUNG v. RIDDELL*

Much of the appeal centers on the bankruptcy court's assessment of the caselaw on the binding nature of assessments against individual partners. Specifically, the court noted: "The only case cited by the IRS in support of their argument is an unpublished decision." [Sept. 11, 2000 Order at 10.] The bankruptcy court referred to Appellant's citation to *Young v. Riddell*, 5 A.F.T.R.2d (RIA) 1037, 60-1 U.S. Tax Cas. (CCH) ¶ 9381, 1959 WL 12113, Civil No. 576-58-K (S.D. Cal. 1959), an unpublished opinion, in which the court held

> Where taxes are assessed against a partnership and under state law each member of the partnership is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability; their liability arises as a matter of state law.

The Ninth Circuit affirmed the lower court's ruling. *See Young v. Riddell* [60-2 USTC ¶ 15,322], 283 F.2d 909 (9th Cir. 1960). The bankruptcy court, however, found that the Ninth Circuit only focused on the fact that a dormant partner can be liable for the partnership's debts, and did not address the assessment issue. [Sept. 11, 2000 Order at 10.]

Appellant attacks this reading of Young, and claims that the case does hold that partners can be individually liable without being personally assessed. [Appellant's Br. at 9.] Debtors contend that Young is inapplicable as it only holds that liability is not created by assessment, but rather arises as a matter of law. [*See* Appellees' Brief. ("Appellees' Br.") at 13.] As there is no error in the bankruptcy court's interpretation of Young, the Court is inclined to agree with the reading.

The district court ruling in Young (upheld by the Court of Appeals) does not hold that the individual assessment of a partners is not required. In the first of the two paragraphs cited by Appellant, the court states, "A person liable for taxes may not recover a refund of taxes he paid because of the fact the assessment did not name him." 60-1 U.S. Tax Cas. (CCH) ¶ 9381, 5 A.F.T.R.2d (RIA) 1037 (emphasis added). In other words, this holding dealt with refunds, rather than the collection of taxes. Moreover, cases cited by the *Young* court following this statement do not address the issue of assessment and collection against a partnership, *See Anderson v. United States* [36-2 USTC ¶ 9316], 83 Ct. Cl. 561, 15 F. Supp. 216 (Ct. Cl. 1936) (holding Commissioner is required to assess the tax (income, estate, gift, *etc.*) rather than assess the taxpayer), *cert. denied*, 300 U.S. 675, 57 S. Ct. 668, 81 L.Ed. 880 (1937); *Pickering v. Alyea-Nichols Co.* [1 USTC ¶ 247], 21 F.2d 501 (7th Cir. 1927), (construing section 503 of the 1917 Revenue Act to allow taxation of an individual in an insurance association as well as the association), *cert. denied*, 276 U.S. 617, 48 S. Ct. 208, 72 L.Ed. 733 (1928).

The Young court continues in the following paragraph, "Where taxes are assessed against a partnership and under state law each member . . . is jointly and

severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability." *Id.* (emphasis added). Again, the court speaks to the issue of individual assessment and the partners' liability, and not to the issue of assessment and collection. The Debtors do not dispute their liability as partners; rather, they dispute Appellant's attempt to collect taxes without individual assessments. This issue was not resolved by the circuit court's decision in Young. Accordingly, it was not error for the bankruptcy court to find that even if the Court of Appeals upheld these findings in Young the findings were inapplicable to this matter.

3. APPELLANT'S ARGUMENT

The authorities cited by Appellant do not address the issue before the Court: whether or not an individual assessment of the Debtors was required in order for the IRS to collect taxes from them.

For example, Appellant cites to *Farrow, Schildhause & Wilson, et al. v. Kings Prof'l Basketball Club*, 1988 U.S. Dist. LEXIS 17331, 1988 WL 161237, Civ. Nos. S-86-1012 RAR, S-86-1459 RAR, *2 (E .D. Cal. Feb. 24, 1988) in which the court held that a federal tax lien for unpaid partnership taxes also attaches to the property of the general partners. Farrow, however, relies upon *Lidberg v. United States* [74-1 USTC ¶ 9287], 375 F. Supp. 631, 633 (D. Minn. 1974) for support. While Lidberg held that the government was entitled to levy a partner's individual property rather than the partnership's overall assets, in Lidberg the partner had been separately assessed. [74-1 USTC ¶ 9287] 375 F. Supp. at 632.

Appellant also cites to *Tony Thornton Auction Service, Inc. v. United States* [86-1 USTC ¶ 9434], 791 F.2d 635 (8th Cir. 1986), in which the court held that a notice was sufficient to perfect a tax lien as to the interests of a husband and wife even though the notice was filed only in the husband's name. Accordingly, Appellant relies on this case in vain.

In *Underwood v. United States* [41-1 USTC ¶ 9296], 118 F.2d 760, 761 (5th Cir. 1941), cited by Appellant, the Government filed notices of tax liens for gasoline taxes owing by a partnership. The court held that the tax liens attached not only to the partnership property but attached also to the property individually owned by the partners. Again, Debtors in this case do not dispute their liability. While Underwood is oft-cited in the courts of the Fifth Circuit, it has yet to be cited for the proposition that a lien filed against a partnership is sufficient for the IRS to collect taxes. *See also Claude F. Atkins Enterprises, Inc. v. United States*, 1995 U.S. Dist. LEXIS 17263, 76 A.F.T.R.2d (RIA) 7453 (E.D. Cal. 1995) (analyzing application of payments to partnership without addressing assessment as a prerequisite to tax collection); *Livingston v. United States* [92-1 USTC ¶ 50,137], 793 F. Supp. 251 (D. Idaho, 1992) (addressing issue of responsibility of partners for partnership's unpaid taxes); *United States v. Ross* [59-2 USTC ¶ 9671], 176 F. Supp. 932 (D. Neb. 1959) (focusing on partner liability).

None of the cases discussed above, nor any others cited by Appellant, directly address individual assessment of the Debtors. The bankruptcy court did not err in finding them inapposite.

4. ASSESSMENT AS A PREREQUISITE TO TAX COLLECTION

Although Appellant's authorities are inapplicable to the issue of assessment and collection as currently presented, cases offered by Appellees do address this.

In *El Paso Refining, Inc. v. I.R.S.* [97-1 USTC ¶ 50,386], 205 B.R. 497, 499 (W.D. Tex. 1996) the court held that "a valid assessment is a prerequisite to tax collection" and failure to assess can result in a finding that the lien in question is void. This case speaks directly to the issue presented here. *See also U.S. v. Coson* [61-1 USTC ¶ 9219], 286 F.2d 453 (9th Cir. 1961) ("Although our decision as to the lack of proper notice or demand is sufficient to dispose of this case, it would appear that the trial court was right in holding the assessment was insufficient for failure to comply with the statutory requirements."); *In re Fingers* [94-2 USTC ¶ 50,434], 170 B.R. 419, 426 (S.D. Cal. 1994) ("Under the Internal Revenue Code, a valid tax assessment is a prerequisite to tax collection."). *Cf. Baily v. United States* [73-1 USTC ¶ 9472], 355 F. Supp. 325 (E.D. Penn. 1973) (finding separate assessment not necessary when the certificate of assessment against the partnership listed individual partners as well). These cases speak directly to this issue. Debtors do not dispute their liability or responsibility to the partnership. Rather, they challenge the effect of the claim against them on the basis of the requirements set forth in El Paso and In re Fingers.

Similarly, in *Valley National Bank of Arizona v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 the court held judgment was not authorized against partners who were neither named nor served in the underlying suit, as "partnership to an action does not in itself make the

partners parties." While this addresses service and not assessment, the principles are analogous. As service is a prerequisite to judgment, assessment is prerequisite to tax collection. *El Paso* [97-1 USTC ¶ 50,386], 205 B.R. at 499, *In re Fingers* [94-2 USTC ¶ 50,434], 170 B.R. at 426. *See also Detrio v. United States* [59-1 USTC ¶ 9367], 264 F.2d 658 (5th Cir. 1959) (finding individual partner not personally served not subject to a lien or execution in satisfaction of the lien); *Fazzi v. Peters*, 68 Cal.2d 590, 440 P.2d 242, 68 Cal. Rptr. 170 (1968) (finding judgment could not be entered against a party served but not named).

Again, as these authorities both address and support Debtors' challenge, the bankruptcy court did not err in relying on them in sustaining the objection to the IRS claim.

5. STATUTE OF LIMITATIONS

Under 26 U.S.C.A. § 6501(a) any tax imposed shall be assessed within three years. The taxes were incurred between 1992 and 1995 and were assessed against the partnership between 1994 and 1995. [Sept. 11, 2000 Order at 11; Appellant's Br. at 5-6] Appellant's argument that the statute of limitations does not bar collection presumes that an assessment of the partnership was sufficient for collection of taxes from the individual Debtors. As this Court finds otherwise, the bankruptcy court was correct in holding that collection was barred because the debtors were not assessed within the three year period.

6. DEBTORS' BURDEN OF PROOF

Finally, under 11 U.S.C. § 502, the IRS claim is valid unless there is an objection, and the debtor has the "burden of presenting evidence to rebut this *prima*

facie validity." *In re MacFarlane*, 83 F.3d 1041, 1044 (9th Cir. 1996). Based on the applicable statutes and decisions, the bankruptcy court correctly found that the Debtors had-presented sufficient evidence to rebut the claim's *prima facie* validity. *See In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991) (setting forth burden shifting analysis).

IV. CONCLUSION

Accordingly, the bankruptcy court's ruling sustaining the claim objection is AFFIRMED.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. EDCV 00-00842-VAP

UNITD STATES OF AMERICA, PLAINTIFF

v.

FRANCESCO BRIGUGLIO, AKA FRANK BRIGUGLIO AND ANGELA BRIGUGLIO, AKA ANGIE BRIGUGLIO, DEFENDANTS

Filed: Mar. 23, 2001

PHILLIPS, District J.

The Court has received and considered all papers filed in conjunction with Appellant's Appeal of the United States Bankruptcy Court Order. The Appeal is appropriate for resolution without oral argument. *See* Fed. R. Civ. P. 78; Local Rule 7. For the reasons set forth below, the Order of the Bankruptcy Court is AFFIRMED.

I. BACKGROUND AND PROCEDURAL HISTORY

Francesco and Angela Briguglio[1] ("Debtors") were general partners of Marina Cabrillo Partners ("Partnership").[2] [*See* Appellant's Opening Brief ("Appellant's Br.") at 4.]. On February 4, 2000 Debtors filed a Joint voluntary chapter 13 petition. [*See* Appellant's Excerpt of Record ("Record"), Ex. 7 (Bankruptcy Court order ("September 12, 2000 Order").] On or about April 21, 2000 the Internal Revenue Service ("IRS") filed a Proof of Claim in the amount of $427,402.74 ("claim"). [Appellant's Br. at 4.] The claim consisted of the following: 1) secured claims totaling $403,264.06 for taxes assessed between January, 1994 and November, 1996 against the Partnership (taxpayer assessment, number 86-0641090); 2) unsecured priority claims totaling $23,296.27 for taxes assessed between September, 1995 and December, 1999 against the Partnership, Francesco Briguglio (in the amount of $21,600.80), and an unidentified taxpayer identification number; and 3) an unsecured general claim in the amount of $872.41 for penalties against the unsecured priority claim. [Appellant's Br. at 4-6.]

The IRS filed notices of federal tax lien with respect to all of the tax liability for which it filed a secured claim. [Appellant's Br. at 6.] On May 4, 2000 Debtors filed an objection to the IRS claim. [*See* Record, Ex. 1 (Debtors' objection).] Debtors object to the claim on the grounds that a substantial portion of the claim

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[1] A.k.a. Frank and Angle Briguglio.

[2] This case raises the same issues as those in *In re Galletti*, EDCV 00-00753-VAP, and involves the same Partnership. Debtors' social security numbers are 380-40-7057 (Mr. Briguglio) and 573-49-1256 (Ms. Briguglio).

consists of taxes assessed the partnership, and the claim is not a proven claim against the estate. [*Id.*; September 12, 2000 order at 3.] While Debtors agree that under California law they are jointly and severally liable for the debts of the Partnership, they argue that the claim must be *individually assessed* before it could be collected against them. [September 12, 2000 Order at 4.]

A. BANKRUPTCY COURT RULING

On September 12, 2000 the bankruptcy court sustained in part and overruled in part the IRS claim.

Neither party disputed that under California law all partners are jointly and severally liable for the debts of a partnership. The main issue before the court was whether or not the tax assessments against the Partnership were effective to bind the Debtors as partners and whether or not the collection itself was barred by the statute of limitations. [Sept. 12, 2000 at 6.]

The Court held that under the Internal Revenue Code ("Code"), to be held liable for tax obligations, a taxpayer must be validly assessed. [Sept. 12, 2000 Order at 8 (citing IRS Code § 6203).] Under the Code, a valid assessment in made by recording the liability of the "taxpayer" in the office of the Secretary. [*Id.*; *See* § 6203.] A "taxpayer" is defined as "any person subject to any internal revenue tax." [*Id.*; *See* § 7701(a)(14).] A "person" include a "an individual, a trust, estate, partnership, association, company, or corporation." [*Id.*] The definitions of "taxpayer" or "person" do not include "partner" or "general partner." [Sept. 12, 2000 order at 9.] The court found, however, that a general partner may be an "individual" subject to taxation. Under these definitions a partner "must be assessed individu-

ally under § 6203 before he can be hold liable." [*Id.*] The court concluded, "[t]herefor, contrary to the IRS's argument, a partner must be assessed individually under § 6203 before be can be held liable." [*Id.*]

As the Court required the Debtors to be assessed individually, under the Code's three year statute of limitations of limitations, the 1992 to 1995 claims against the Debtors as individual partners were time-barred.[3] [Sept. 12, 2000 order at 11; Code § 6501(a).] The Debtors as individual partners were not assessed within the three year statute of limitations, and therefore collection was barred. [*Id.*]

The court sustained Debtors' objection to the claim in the amount of $403,264.06. [Sept. 12, 2000 Order at 12.] As Debtors presented no evidence to dispute the validity of the $21,600.80 apportioned to Mr. Briguglio's socal security number, the $1,501.31 owed by taxpayer identification number 95-6537344, and the unsecured general claim for penalties in the amount of $ 862,41, the court overruled the objections to those amounts.[4] [Sept. 12, 2000 Order at 12-13].

The IRS ("Appellant") filed an Appeal on November 24, 2000. Debtors filed Opposition on December 21, 2000. Appellant filed a Reply on January 2, 2001.

II. LEGAL STANDARD

A reviewing court reviews a bankruptcy court's conclusions of law *de novo*. *See Siriani v. Northwestern Nat'l Ins. Co.*, 967 F.2d 302, 303-04 (9th Cir. 1992).

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[3] The court noted that in this case the proof of claim is the equivalent of a lien. [Sept. 12, 2000 Order at 6.]

[4] The appeal, therefore, only discusses the objection to the $403,264.06 claim.

Findings of fact are reviewed for clear error. *See id.* The bankruptcy court's choice of remedies is reviewed for an abuse of discretion, since it has broad equitable remedial powers. *See In re Goldberg*, 168 B.R. 382, 384 (9th Cir. 1994). A bankruptcy court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990). Under this standard, "a reviewing court cannot reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *In re Sunnymead Shopping Center Co.*, 178 B.R. 809, 814 (9th Cir. 1995) (citing *Goldberg*, 168 B.R. at 384).

III. DISCUSSION

A. ISSUES ON APPEAL

1. STATUTORY ANALYSIS

Appellant disputes the bankruptcy court's interpretation of the applicable code sections. [*See* Appellant's Reply Brief ("Reply") at 2.] It argues that a general partner is within neither the statutory definition of "taxpayer" nor "person," and is not an "individual" as the bankruptcy court found. [*Id.*] Appellant claims that defining "individual" to include a general taxpayer would produce absurd results, but offers no authority to support this contention. [Reply at 3.]

Appellant contends that requiring separate assessment of partners would be unconstitutional because it would require the IRS to assess the liability of a general partner premised on state law. [Reply at 4.] It is well-

established, however, that state law definitions determine liability, especially in the area of partnership law.

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Appellant analyzes Internal Revenue Code section 3403 in the context of other sections imposing liability on third partes. [Reply at 4.] Appellant argues that if Congress had intended to require individual assessment of general partners, Congress would have enacted a provision requiring such assessment. [*Id.*] While Appellant cites one example of a Code section requiring assessment (section 6627(a)) and one example of a Code section in which assessment is not mentioned or required (section 3505(a)). Appellant still offers no authority stating that a court cannot, based on statutory definition and caselaw, find that individual assessment is required. [See Reply at 5.]

Accordingly, Appellant cites no compelling reason, nor authority to substantiate, why it was error for the bankruptcy court, in interpreting the statute, to read "individual" as including individuals who are general partners of partnerships.

2. THE BANKRUPTCY COURT'S ANALYSIS OF RELEVANT CASELAW

a. *YOUNG v. RIDDELL*

Much of the appeal centers on the bankruptcy court's assessment of the caselaw on the binding nature of assessments against individual partners. Specifically, the court noted: "The only case cited by the IRS in support of their argument is an unpublished decision." [Sept. 12, 2000 Order at 10.] The bankruptcy court referred to Appellant's citation to *Young v. Riddell*, 5 A.F.T.R. 2d 1037, 60-1 USTC [¶ 9381], 1959 WL 12113, Civil No. 576-58-K (S.D. Cal. 1959), an unpublished opinion, in which the court held:

> Where taxes are assessed Against a partnership and under state law each member of the partnership is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability; their liability arises as a matter of state law.

The Ninth Circuit affirmed the lower court's ruling. *See Young v. Riddell* [60-2 USTC ¶ 15,322], 283 F.2d 909 (9th Cir. 1960). The bankruptcy court, however, found that the Ninth Circuit only focused on the fact that a dormant partner can be liable for the partnership's debts, and did not address the assessment issue. [Sept. 12, 2000 order at 10.]

Appellant attacks this reading of *Young*, and claims that the case does hold that partners can be individually liable without being personally assessed. [Appellant's Br. at 13.] Debtors contend that *Young* is inapplicable as it only holds that liability is not created by assessment, but rather arises as a matter of law. [*See* Appellees' Brief ("Appellees' Br.") at 12-13.] As there is no error in the bankruptcy court's interpretation of *Young*, the Court is inclined to agree with the reading.

The district court ruling in *Young* (upheld by the Court of Appeals) does not hold that the individual assessment of a partner in not required. In the first of the two paragraphs cited by Appellant, the court states, "A person liable for taxes may not recover a *refund* of taxes he paid because of the fact the assessment did not name him." 5 A.F.T.R.2d 1037 (emphasis added). In other words, this holding dealt with refunds, rather than the collection of taxes. Moreover, cases cited by the *Young* court following this statement do not address the issue of assessment and collection against a

partnership. *See Anderson v. United States* [36-2 USTC ¶ 9342], 15 F. Supp. 216 (Ct. Cl. 1936) (holding Commissioner is required to assess the tax (income, estate, gift, *etc.*) rather than assess the taxpayer), *cert. denied*, 300 U.S. 675, 57 S. Ct. 668, 81 L.Ed. 880 (1937); *Pickering v. Alyea-Nichols Co.*, [1 USTC ¶ 247], 21 F.2d 501 (7th Cir. 1927), (construing section 503 of the 1917 Revenue Act to allow taxation of an individual in an insurance association as well as the association), *cert. denied*, 276 U.S. 617, 48 S. Ct. 208, 72 L.Ed. 733 (1928).

The *Young* court continues in the following paragraph, "Where taxes are assessed against a partnership and under state law each member . . . is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order *to create liability* ." *Id.* (emphasis added). Again, the court speaks to the issue of assessment and the partners' liability, and, not to the issue of individual assessment and collection. The Debtors do not dispute their liability an partners; rather, they dispute Appellant's attempt to collect taxes without individual assessments. This issue was not resolved by the circuit court's decision in *Young*. Accordingly, it was not error for the bankruptcy court to find that even if the Court of Appeals upheld theme findings in *Young* the findings were inapplicable.

3. APPELLANT'S ARGUMENT

The authorities cited by Appellant do not address the issue before the Court: whether or not an individual assessment of the Appellees was required in order for the IRS to collect taxes from them.

For example, Appellant cites to *Farrow, Schildhause & Wilson. et al. v. Kings Prof'l Basketball Club* [88-1

USTC ¶ 9333], 1998 WL 162237, Civ. Nos. S-86-1012 RAR, S-86-1459 RAR,*2 (E.D. Cal. Feb. 24, 1988) in which the court held that a federal tax lien for unpaid partnership taxes also attaches to the property of the general partners. *Farrow*, however, relies upon *Lidberg v. United States* [74-1 USTC ¶ 9287], 375 F. Supp. 631, 633 (D. Minn. 1974) for support. While *Lidberg* held that the government was entitled to levy a partner's individual property rather than the partnership's overall assets, in *Lidberg* the partner *had* been separately assessed. [74-1 USTC ¶ 9287] 375 F. Supp. at 632.

Appellant also cites to *Tony Thornton Auction Service, Inc. v. United States* [86-1 USTC ¶ 9434], 791 F.2d 635 (8th Cir. 1986), in which the court held that a notice was sufficient to perfect a tax lien as to the interests of a *husband* and *wife* even though the notice was filed only in the husband's name. Accordingly, Appellant relies on this case in vain.

In *Underwood v. United States* [41-1 USTC ¶ 9296], 118 F.2d 760, 761 (5th Cir. 1941), cited by Appellant, the Government filed notices of tax liens for gasoline taxes owing by a partnership. The court held that the tax liens attached not only to the partnership property but attached also to the property individually owned by the partners. Again, Debtors in this case do not dispute their liability. While *Underwood* is oft-cited in the courts of the Fifth Circuit, it has yet to be cited for the proposition that a lien filed against a partnership *is sufficient for the IRS to collect taxes. See also Claude F. Atkins Enterprises, Inc. v. United States*, 76 A.F.T.R.2d 95-7453 (E.D. Cal. 1995) (analyzing application of payments to partnership without addressing assessment as a prerequisite to tax collection);

Livingston v. United States [92-1 USTC ¶ 50,137], 793 F. Supp. 251 (D. Idaho, 1992) (addressing issue of responsibility of partners for partnership's unpaid taxes); *United States v. Ross*, 176 F. Supp. 932 (D. Neb. 1959) (focusing on partner liability).

None of the cases discussed above, nor any others cited by Appellant, directly address individual assessment of the Debtors. The bankruptcy court did not err in finding them inapposite.

4. ASSESSMENT AS A PREREQUISITE TO TAX COLLECTION

Although Appellant's authorities are inapplicable to the issue of assessment and collection, cases offered by Debtors do address this.

In *El Paso Refining, Inc. v. I.R.S.* [97-1 USTC ¶ 50,386], 205 B.R. 497, 499 (W.D. Tex. 1996) the court hold that "a valid assessment is a prerequisite to tax collection" and failure to assess can result in a finding that the lien in question is void. This case speaks directly to the issue presented here. *See also U.S. v. Coson* [61-1 USTC ¶ 9219], 286 F.2d 453 (9th Cir. 1961) ("Although our decision as to the lack of proper notice or demand is sufficient to dispose of this case, it would appear that the trial court was right in holding the assessment was insufficient for failure to comply with the statutory requirements."); *In re Fingers* [94-2 USTC ¶ 50,434], 170 B.R. 419, 426 (S.D. Cal. 1994) ("Under the Internal Revenue Code, a valid tax assessment is a prerequisite to tax collection."). *Cf. Bailey v. United States* [73-1 USTC ¶ 9472], 355 F. Supp. 325 (E.D. Penn. 1973) (finding separate assessment not necessary when the certificate of assessment against the partnership listed individual partners as well).

These cases speak *directly* to this issue. Debtors do not dispute their liability or responsibility to the partnership. Rather, they challenge the effect of the claim against them on the basis of the requirements set forth in *El Paso* and *In re Fingers*.

Similarly, in *Valley National Bank of Arizona v. A.E. Rouse & Co.*, 121 F.3d 1332, 1335 the court held judgment was not authorized against partners who were neither named nor served in the underlying suit, as "partnership to an action does not in itself make the partners parties." While this addresses service and not assessment, the principles are analogous: as service is a prerequisite to judgment, assessment is a prerequisite to tax collection. *El Paso*, 205 B.R. at 499, *In re Fingers* 94-2 USTC ¶ 50,434], 170 B.R. at 426. *See also Detrio v. United States* [59-1 USTC ¶ 9367], 264 F.2d 658 (5th Cir. 1959) (finding individual partner not personally served not subject to a lien or execution in satisfaction of the lien); *Fazzi v. Peters*, 68 Cal.2d 590, 440 P.2d 242, 68 Cal. Rptr. 170 (1968) (finding judgment could not be entered against a party served but not named).

Again, as these authorities both address and support Debtors' challenge, the bankruptcy court did not err in relying on them in sustaining the objection to the IRS claim.

5. STATUTE OF LIMITATIONS

Under 26 U.S.C.A. § 6501(a) any tax imposed shall be assessed within three years. The taxes were incurred between 1992 and 1995 and were assessed against the partnership between 1994 and 1995. [Sept. 12, 2000 Order at 11; Appellant's Br. at 5-6] Appellant's argument that the statute of limitations does not bar

collection presumes that an assessment of the partnership was sufficient for collection of taxes from the individual Debtors. As this Court finds otherwise, the bankruptcy court was correct in holding that collection was barred because the debtors were not assessed within the three year period.

6. DEBTORS' BURDEN OF PROOF

Finally, under 11 U.S.C. § 502, the IRS claim is valid unless there is an objection, and the debtor has the "burden of presenting evidence to rebut this *prima facie* validity." *In re MacFarlane*, 83 F.3d 1041, 144 (9th Cir. 1996). Based on the applicable statutes and decisions, the bankruptcy court correctly found that the Debtors had presented sufficient evidence to rebut the claim's *prima facie* validity. *See In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991) (setting forth burden shifting analysis).

IV. CONCLUSION

Accordingly, the bankruptcy court's ruling sustaining the claim objection is AFFIRMED.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

No. LA 99-48587-ER

IN RE: ABEL COSMO GALLETTI, AKA AL GALLETTI AND SARAH GALLETTI, DEBTORS

Filed: Sept. 11, 2000

MEMORANDUM OF DECISION

ROBLES, Bankruptcy J.

On May 15, 2000, the Court heard the Objection to Claim of United States of America, Department of the Treasury, Internal Revenue Service ("Claim Objection") filed by the Debtors and the Opposition thereto filed by the United States of America, Department of the Treasury, Internal Revenue Service ("IRS"). Appearances were as noted on the record. The Court continued the matter to July 31, 2000 and ordered further briefing on the issues presented. After entertaining oral argument at the continued hearing on July 31, 2000, the Court took the matter under submission. For the reasons set forth more fully below, the Court sustains the Claim Objection.

I.

FACTS

Debtors filed a joint voluntary chapter 13 petition on October 20, 1999. The IRS filed a proof of claim in the amount of $395,179.89 (the "claim"). The claim consists of the following:

1. Secured claims totaling $395,006.37 for taxes assessed between January, 1994 and July, 1995 against taxpayer identification number 86-0641090.

2. Unsecured priority claim in the amount of $160.36 for taxes assessed on December 4, 1995 against taxpayer identification number 86-0641090.

3. Unsecured general claim in the amount of $13.16 for penalties against the unsecured priority claim.

Debtors' social security numbers are 379-34-6851 and 371-42-5311. Taxpayer identification number 86-0641090 belongs to the Marina Cabrillo Partners. The Debtors were partners of Marina Cabrillo Partners (the "partnership").

Debtors filed an objection to the IRS claim on April 17, 2000. Debtors argue that the claim should be disallowed because it is not a proven claim against the estate. The claim consists of taxes assessed against the partnership. While Debtors do not dispute that California law makes all partners jointly and severally liable for the debts of a partnership, they argue that they must be *individually* assessed before collection can be effected against them.

Debtors assert that relevant case law supports their position. In *El Paso Refining, Inc. v. IRS*, the bank-

ruptcy court held that a valid assessment against individual partners was a prerequisite to tax collection by the IRS. *See El Paso* [97-1 USTC ¶ 50,386], 205 B.R. 497 Bankr. W.D. Tex. 1996. The *El Paso* court strictly interpreted Internal Revenue Code § 6203, which provides that an assessment is made by recording the liability of the taxpayer in the office of the Secretary. *See id.*; 26 U.S.C. § 6203.[1]

Debtors also rely on the holdings of *Coson v. United States* [59-1 USTC ¶ 9168], 169 F. Supp. 671 [3 AFTR 2d 462] (S.D. Cal. 1958), *modified on other grounds*, 286 F.2d 453 [7 AFTR 2d 589] (9th Cir. 1961), and *Bailey v. United States* [73-1 USTC ¶ 9472], 355 F. Supp. 325 [32 AFTR 2d 73-5138] (E.D. Penn. 1973). In *Coson*, the court held that assessment against the plaintiff's business was insufficient to create a lien against the individual plaintiff's property because the individual was never assessed. *See id.* However, in *Bailey*, the court found that although the individual partner was never assessed, he was liable because he was listed on the certificate of assessment against the partnership. Here, only the partnership was listed on the assessment. Therefore, Debtors assert that they have not been properly assessed as individuals and the IRS claim is invalid.

Further, Debtors assert that the IRS claim is invalid because it is beyond the statute of limitations. Under § 6501, tax liabilities must be assessed within three years of the date a tax return is filed or should have been filed. Because the tax liabilities are for the years

[1] All statutory references are to the Internal Revenue Code unless otherwise indicated.

1992 through 1995, Debtors assert that the statute of limitations has passed.

In Opposition, the IRS asserts that a separate assessment against a general partner is not required by the Internal Revenue Code if the partnership was properly assessed. The IRS asserts that in order to determine whether the assessment is valid against the Debtors as general partners, § 6203 is not applicable. Under that provision, an assessment is made by recording the liability of the taxpayer in the office of the Secretary. The term "taxpayer" is defined as any person subject to any Internal Revenue tax and the definition of "person" includes an individual or partnership. *See* §§ 7701(a)(1) and (a)(13). The IRS argues that "general partner" is not included in the definition of "taxpayer" and, therefore, § 6203 does not apply.

The IRS asserts that the starting point in this analysis is § 3401. Under § 3401, an employer is liable for the payment of employment taxes required to be withheld from an employee's salary. The term "employer" is defined to be an individual or a partnership (among other entities). However, the definition of the term "employer" does not include a "general partner" or "partner" and, therefore, the IRS asserts that they are not subject to liability under § 3401. Based upon the foregoing, the IRS argues that a general partner is neither a "taxpayer" subject to an internal revenue tax nor a "person." Therefore, the assessment referred to in § 3401 is the assessment against the partnership and the applicable "taxpayer" for identification purposes is the partnership.

The IRS argues that requiring a separate assessment against the general partner would require expansion of the definitions of "employer" and "taxpayer" to include

"general partners" in order to make them liable under § 3401. However, such interpretation is not the result intended by Congress and would render portions of § 3401 unconstitutional "because the making of such assessment expansion is premised upon the IRS' making an interpretation of the applicable state law that a general partner is liable for its debts." IRS Supplemental Memorandum at 5.

Further, the IRS asserts that binding Ninth Circuit authority favors the government's position. The IRS asserts that the only binding case is *Young v. Riddell*, 60-1 USTC ¶ 9381 (S.D. Cal. 1959), *aff'd* [60-2 USTC ¶ 15,322], 283 F.2d 909 (9th Cir. 1960), which held that

> where taxes are assessed against the partnership and under state law each member of the partnership is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability; their liability arises as a matter of state law.

The IRS asserts that the cases relied upon by the Debtors are not directly on point because they do not address whether a separate assessment is required against the individual partners of a partnership.

Finally, the IRS argues that if no separate assessment against the general partners are required, then the Debtors' statute of limitation argument is rendered moot because the employment taxes were assessed within three years of the due date of employment tax returns under § 6501.

In Response, the Debtors assert that the IRS's statutory interpretation argument is without merit. Section 3401 does not exclude the individual liability of general

partners. The terms "individual" and "taxpayer" include general partners. Further, Debtors argue that there is no binding authority to support the IRS's position. The case relied upon by the IRS, *Young v. Ridell*, is an unpublished opinion. The Ninth Circuit opinion did not adopt or restate the language quoted by the IRS from the lower court decision.

Debtors assert that the IRS's attempt to distinguish the case law cited by the Debtors is false. The issue is whether a separate assessment is required to collect or enforce the payment of taxes against an individual partner. In the instant case, the proof of claim is the equivalent of a lien. Therefore, the issue is whether individual assessment was a procedural prerequisite to a lien (proof of claim).

II.

ANALYSIS

Neither party disputes that under California law all partners are jointly and severally liable for the debts of a partnership, including tax liabilities. *See* California Corporations Code Section 16306(a).[2] The Debtors do not dispute that they were partners in the partnership. The issues, therefore, are whether the tax assessments against the partnership were effective to bind the Debtors as partners and whether collection is barred by the statute of limitations.

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[2] California Corporations Code § 16306(a) provides:

> Except as otherwise provided in subsections (b) and (c), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

A. The tax assessments against the partnership were not effective to bind the Debtors as partners.

1. The Partnership is liable for the taxes required to be deducted or withheld.

Section 3403 provides that the "employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter." § 3403. As used in § 3403, "employer" means "the person for whom an individual performs or performed any service." § 3401(d). "Person" is defined in § 7701(a)(1) to include an individual or partnership. *See* § 7701(a)(1). The "person" for whom the Debtors performed services was the partnership. Therefore, the partnership is liable for the payment of taxes required to be deducted and withheld.

2. To hold a partner liable for the debts of a partnership under California law, a judgment must be entered against the partner.

In California, "a partnership is an entity distinct from its partners." California Corporations Code § 16201. Although all partners are liable jointly and severally for the obligations of the partnership, "a judgment against a partnership is not by itself a judgment against a partner." California Corporations Code §§ 16306 and 16307(c). In fact, "a judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner." California Corporations Code § 16307(c). It naturally follows that in order for partners to be jointly and severally liable for tax liabilities, they must be assessed separately.

3. To be deld liable for tax obligations, a taxpayer must be validly assessed.

In order to be held liable for taxes owed, the first requirement is valid assessment of the taxpayer. The Internal Revenue Code provides that a valid assessment is made by recording the liability of the "taxpayer" in the office of the Secretary. *See* § 6203.[3] "Taxpayer" is defined as "any person subject to any internal revenue tax." § 7701(a)(14). The definition of "person" includes "an individual, a trust, estate, partnership, association, company or corporation." § 7701(a)(1). As noted by the IRS, the definitions of "taxpayer" and "person" do not include "partner" or "general partner." However, the definition of "person" includes an "individual" and the definition of "taxpayer" is simply one who is subject to taxation. A general partner may be, as is the case here, an individual person subject to taxation. Therefore, contrary to the IRS's argument, a partner must be assessed individually under § 6203 before he can be held liable.

4. Relevant case law provides that individual assessment is required in order to hold partners liable for the tax obligations of a partnership.

In *El Paso*, the bankruptcy court was faced with a similar fact situation. The IRS assessed the partnership, but not the partner individually. The bankruptcy court held that a valid assessment against a

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[3] Section 6203 provides in relevant part:

> The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with the rules or regulations prescribed by the Secretary.

partner was a "prerequisite to tax collection," even when the partnership had been assessed. *See El Paso* [97-1 USTC § 50,386], 205 B.R. at 500. The court reasoned that the IRS must strictly comply with § 6203. *See id.*[4]

Further, in *Coson v. United States* [59-1 USTC ¶ 9168], 169 F. Supp. 671 (S.D. Cal. 1958), *modified and aff'd. on other grounds* [61-1 USTC ¶ 9219], 286 F.2d 453 (9th Cir. 1961), the taxpayer brought an action to quiet title against the government's notice of federal tax liens against his property. The assessment did not identify the taxpayer. The court stated that "[n]o case has been discovered which deals with the required identification of an individual in order for there to be an assessment of taxes against him. However, on the facts of this case, it is concluded that the [taxpayer] herein never was assessed for these taxes." *Id.* at 676. Since a tax lien arises at the time of assessment, the court held that since the taxpayer was never assessed, the government did not have a lien. *See id.*

On appeal, the Ninth Circuit affirmed the lower court's decision that the lien was invalid. *See Coson* [61-1 USTC ¶ 9219], 286 F.2d 453. However, the Court focused on the fact that notice and demand had not been given to the taxpayer instead of the assessment problem. The Court did state, however, that "[a]lthough our decision as to the lack of proper notice and demand is sufficient to dispose of this case, it would appear that the trial court was right in holding the

[4] The court also held that demand and notice on the partnership was insufficient to establish a federal tax lien on the separate property of the partner. *See El Paso* [97-1 USTC ¶ 50,386], 205 B.R. at 500.

assessment was insufficient for failure to comply with the statutory requirements," *Id.* at 464.

The court in *Bailey v. United States* [73-1 USTC ¶ 9472], 355 F. Supp. 325 (E.D. Penn. 1973), did not hold that separate assessment was mandatory in order to find individual partners liable. However, the certificate of assessment against the partnership listed the individual partners as well. In the instant case, the certificate of assessment only listed the partnership.

The only case cited by the IRS in support of their argument is an unpublished decision. In *Young v. Riddell*, 60-1, USTC ¶ 9381 (S.D. Cal. 1959), the court held that:

> Where taxes are assessed against a partnership and under state law each member of the partnership is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability; their liability arises as a matter of state law.

The Ninth Circuit decision which affirmed the lower court's ruling did not address the issues before the Court at this time. See *Young v. Riddell* [60-2 USTC ¶ 15,322], 283 F.2d 909 (9th Cir. 1960). The Court's holding was focused on the fact that a dormant partner is also liable for the debts of a partnership.

Based upon the foregoing, the Court finds that the Debtors, as general partners, are not bound by the assessment of the partnership.

B. The statute of limitations bars collection of the partnership tax liability from the Debtors.

Section 6501(a) provides that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed . . ." § 6501(a). The partnership taxes were incurred between 1992 and 1995 and were assessed against the partnership between January, 1994 and December, 1995. Since the Debtors, as individual partners, were not assessed within the three year statute of limitations, collection is barred. See § 6501(a).

C. The Debtors have met their burden to defeat the IRS claim.

Title 11 U.S.C. § 502(a) provides that "a claim or interest, proof of which is filed under § 501 of this title, is deemed allowed, unless a party in interest . . . objects." A proof of claim "executed and filed in accordance with [the Bankruptcy Rules constitutes] prima facie evidence of the validity and amount of the claim." Federal Rule of Bankruptcy 3001(f). "The debtor or trustee has the burden of presenting evidence to rebut this prima facie validity." *In re MacFarlane*, 83 F.3d 1041, 1044 (9th Cir. 1996). The objecting party must show facts which would tend to defeat the claim by "probative force equal to that of the allegations of the proofs of claim themselves." *In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991).

If that burden is met, the creditor must present evidence to prove the claim. The claimant must prove the validity of the claim by a preponderance of the evidence. "The ultimate burden of proof therefore is on the creditor." *MacFarlane*, 83 F.3d at 1044.

In the instant case, the Debtors have met their burden of proof to rebut the validity of the IRS claim. Therefore, the Court sustains the Debtors' claim objection.

III.

CONCLUSION

Based upon the foregoing, the claim objection is sustained. The Court will prepare an order consistent with this memorandum of decision.

APPENDIX E

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
Los Angeles Division

No. LA 00-13574-ER

IN RE: FRANCESCO BRIGUGLIO, AKA FRANK BRIGUGLIO AND ANGELA BRIGUGLIO, AKA ANGIE BRIGUGLIO, DEBTORS

Filed: Sept. 11, 2000

MEMORANDUM OF DECISION

ROBLES, Bankruptcy J.

On June 19, 2000, the Court heard the Objection to Claim of United States of America, Department of the Treasury, Internal Revenue Service ("Claim Objection") filed by the Debtors and the Opposition thereto filed by the United States of America, Department of the Treasury, Internal Revenue Service ("IRS") Appearances were as noted on the record. The Court continued the matter to July 31, 2000 and ordered further briefing on the issues presented. After entertaining oral argument at the continued hearing on July 31, 2000, the Court took the matter under submission. For the reasons set forth more fully below, the Court sustains the Claim Objection in part.

I. FACTS

Debtors filed a Joint voluntary chapter 13 petition on February 4, 2000. The IRS filed a proof of claim in the amount of $427,402.14 (the "claim"). The claim consists of the following:

1. Secured claims totaling $403,264.06 for taxes assessed between January, 1994 and November, 1996 against taxpayer identification number 86-0641090.

2. Unsecured priority claims totaling $23,266.27 for taxes assessed between September, 1995 and December, 1999 against taxpayer identification numbers 86-0641090, 380-40-7057 and 95-6537344.[1]

3. Unsecured general claim in the amount of $872.41 for penalties against the unsecured priority claim.

Debtors' social security numbers are 380-40-7057 and 573-49-1256, Taxpayer identification number 86-0641090 belongs to the Marina Cabrillo Partners. The Debtors were partners of Marina Cabrillo Partners (the "partnership"). Neither party has presented the Court with any evidence as to the identity of Taxpayer identification number 95-6537344.

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[1] The amount consists of:

1. $164.16 assessed in October, 1998 against taxpayer identification number 86-0641090.

2. $21,600.80 assessed in November, 1998 and estimated for the year 1999 against taxpayer identification number 380-40-7057.

3. $1,501.31 estimated for the tax year 1999 against taxpayer identification number 95-6537344.

Debtors filed an objection to the IRS Claim on May 4, 2000. Debtors argue that the claim should be disallowed because it is not a proven claim against the estate. A substantial portion of the claim consists of taxes assessed against the partnership. While Debtors do not dispute that California law makes all partners jointly and severally liable for the debts of a partnership, they argue that they must be *individually* assessed before collection can be effected against them.

Debtors assert that relevant case law supports their position. In *El Paso Refining, Inc. v. IRS*, the bankruptcy court held that a valid assessment against individual partners was a prerequisite to tax collection by the IRS. *See El Paso*, [97-1 USTC ¶ 50,386] 205 B.R. 497 (Bankr. W.D. Tex. 1996). The *El Paso* court strictly interpreted Internal Revenue Code Section 6203, which provides that an assessment is made by recording the liability of the taxpayer in the office of the Secretary. *See id.*; 26 U.S.C. Section 6203.[2]

Debtors also rely on the holdings of *Coson v. United States*, [59-1 USTC ¶ 9168] 169 F. Supp. 671 (S.D. Cal. 1958), *modified on other grounds* [61-1 USTC ¶ 9219], 286 F.2d 453 (9th Cir. 1961), and *Bailey v. United States*, 355 F. Supp. 325 (E.D. Penn. 1973). In Coson, the court held that assessment against the plaintiff's business was insufficient to create a lien against the individual plaintiff's property because the individual was never assessed. *See id.* However, in *Bailey*, the court found that although the individual partner was never assessed, he was liable because he was listed on the certificate of assessment against the partnership.

[2] All statutory references are to the Internal Revenue Code unless otherwise indicated.

Here, only the partnership was listed on the assessment. Therefore, Debtors assert that they have not been properly assessed as individuals and the IRS claim is invalid.

Further, Debtors assert that the IRS claim is invalid because it is beyond the statute of limitations. Under Section 6501, tax liabilities must be assessed within three years of the date a tax return is filed or should have been filed. Because the tax liabilities are for the years 1992 through 1994, Debtors assert that the statute of limitations has passed.

In Opposition, the IRS asserts that a separate assessment against a general partner is not required by the Internal Revenue Code if the partnership was properly assessed. The IRS asserts that in order to determine whether the assessment is valid against the Debtors as general partners, Section 6203 is not applicable. Under that provision, an assessment is made by recording the liability of the taxpayer in the office of the Secretary. The term "taxpayer" is defined as any person subject to any internal revenue tax and the definition of "person" includes an individual or partnership. *See* Sections 7701(a)(1) and (a)(13). The IRS argues that "general partner" is not included in the definition of "taxpayer" and, therefore, Section 6203 does not apply.

The IRS asserts that the starting point in this analysis is Section 3401. Under Section 3401, an employer is liable for the payment of employment taxes required to be withheld from an employee's salary. The term "employer" is defined to be an individual or a partnership (among other entities). However, the definition of the term "employer" does not include a "general partner" or "partner" and, therefore, the IRS asserts that they are not subject to liability under

Section 3401. Based upon the foregoing, the IRS argues that a general partner is neither a "taxpayer" subject to an internal revenue tax nor a "person." Therefore, the assessment referred to in § 3401 is the assessment against the partnership and the applicable "taxpayer" for identification purposes is the partnership.

The IRS argues that requiring a separate assessment against the general partner would require expansion of the definitions of "employer" and "taxpayer" to include "general partners" in order to make them liable under Section 3401. However, such interpretation is not the result intended by Congress and would render portions of Section 3401 unconstitutional "because the making of such assessment expansion is premised upon the IRS' making an interpretation of the applicable state law that a general partner is liable for its debts." IRS Supplemental Memorandum at 5.

Further, the IRS asserts that binding Ninth Circuit authority favors the government's position. The IRS asserts that the only binding case is *Young v. Riddell*, 60-1 USTC paragraph 9381 (S.D. Cal. 1959), *aff'd*, [60-2 USTC ¶ 15,323] 283 F.2d. 909 (9th Cir. 1960), which held that

> where taxes are assessed against the partnership and under state law each member of the partnership is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability; their liability arises as a matter of state law.

The IRS asserts that the cases relied upon by the Debtors are not directly on point because they do not address whether a separate assessment is required against the individual partners of a partnership.

Finally, the IRS argues that if no separate assessment against the general partners are required, then the Debtors' statute of limitation argument is rendered moot because the employment taxes were assessed within three years of the due date of employment tax returns under Section 6501.

In Response, the Debtors assert that the IRS's statutory interpretation argument is without merit. Section 3401 does not exclude the individual liability of general partners. The terms "individual" and "taxpayer" include general partners. Further, Debtors argue that there is no binding authority to support the IRS's position. The case relied upon by the IRS, *Young v. Ridell*, is an unpublished opinion. The Ninth Circuit opinion did not adopt or restate the language quoted by the IRS from the lower court decision.

Debtors assert that the IRS's attempt to distinguish the case law cited by the Debtors is false. The issue is whether a separate assessment is required to collect or enforce the payment of taxes against an individual partner. In the instant case, the proof of claim is the equivalent of a lien. Therefore, the issue is whether individual assessment was a procedural prerequisite to a lien (proof of claim).

II. ANALYSIS

Neither party disputes that under California law all partners are jointly and severally liable for the debts of a partnership, including tax liabilities. *See* California Corporations Section 16306(a).[3] The Debtors do not

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[3] California Corporations Code Section 16306(a) provides:

dispute that they were partners in the partnership. The issues, therefore, are whether the tax assessments against the partnership were effective to bind the Debtors as partners and whether collection is barred by the statute of limitations.

A. The tax assessments against the partnership were not effective to bind the debtors as partners.

1. The partnership is liable for the taxes required to be deducted or withheld

Section 3403 provides that the "employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter" Section 3403. As used in Section 3403, "employer" means "the person for whom an individual performs or performed any service." Section 3401(d). "Person" is defined in Section 7701(a)(1) to include an individual or partnership. *See* Section 7701(a)(1). The "person" for whom the Debtors performed services was the partnership. Therefore, the partnership is liable for the payment of taxes required to be deducted and withheld.

2. To hold a partner liable for the debts of a partnership under California law, a judgment must be entered against the partner

In California, "a partnership is an entity distinct from its partners," California Corporations Code Section 16201. Although all partners are liable jointly and severally for the obligations of the partnership, "a

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Except as otherwise provided in subsections (b) and (c) all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

judgment against a partnership is not by itself a judgment against a partner." California Corporations Code Sections 16306 and 16307(c). In fact, "a judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner." California Corporations Code Section 16307(c). It naturally follows that in order for partners to be jointly and severally liable for tax liabilities, they must be assessed separately.

3. To be held liable for tax obligations, a taxpayer must be validly assessed

In order to be held liable for taxes owed, the first requirement is valid assessment of the taxpayer. The Internal Revenue Code provides that a valid assessment is made by recording the liability of the "taxpayer" in the office of the Secretary. *See* Section 6203.[4] "Taxpayer" is defined as "any person subject to any internal revenue tax" Section 7701(a)(14). The definition of "person" includes "an individual, a trust, estate, partnership, association, company or corporation." Section 7701(a)(1). As noted by the IRS, the definitions of "taxpayer" and "person" do not include "partner" or "general partner." However, the definition of "person" includes an "individual" and the definition of "taxpayer" is simply one who is subject to taxation. A general partner may be, as is the case here, an individual person subject to taxation. Therefore, contrary to the IRS's argument, a partner must be assessed individually under Section 6203 before he can be held liable.

---

[4] Section 6203 provides in relevant part:

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with the rules or regulations prescribed by the Secretary.

4. Relevant case law provides that individual assessment is required in order to hold partners liable for the tax obligations of a partnership.

In *El Paso*, the bankruptcy court was faced with a similar fact situation. The IRS assessed the partnership, but not the partner individually. The bankruptcy court held that a valid assessment against a partner was a "prerequisite to tax collection," even when the partnership had been assessed. *See El Paso*, [97-1 USTC ¶ 50,386] 205 B.R. at 500. The court reasoned that the IRS must strictly comply with Section 6203. *See id.*[5]

Further, in *Coson v. United States*, [59-1 USTC ¶ 9168] 169 F. Supp. 671 (S.D. Cal.1958), *modified and aff'd. on other grounds*, [61-1 USTC ¶ 9219] 286 F.2d 453 (9th Cir. 1961), the taxpayer brought an action to quiet title, against the government's notice of federal tax liens against his property. The assessment did not identify the taxpayer. The court stated that "[n]o case has been discovered which deals with the required identification of an individual in order for there to be an assessment of taxes against him. However, on the facts of this case, it is concluded that the [taxpayer] herein never was assessed for these taxes." *Id.* at 676. Since a tax lien arises at the time of assessment, the court held that since the taxpayer was never assessed, the government did not have a lien. *See id.*

On appeal, the Ninth Circuit affirmed the lower court's decision that the lien was invalid. *See Coson*, [61-1 USTC ¶ 9219] 286 F.2d 453. However, the Court

[5] The court also held that demand and notice on the partnership was insufficient to establish a federal tax lien on the separate property of the partner. *See El Paso*, [97-1 USTC ¶ 50,386] 205 B.R. at 5000.

focused on the fact that notice and demand had not been given to the taxpayer instead of the assessment problem. The Court did state, however, that "[a]lthough our decision as to the lack of proper notice and demand is sufficient to dispose of this case, it would appear that the trial court was right in holding the assessment was insufficient for failure to comply with the statutory requirements." *Id.* at 464.

The court in *Bailey v. United States*, [73-1 USTC ¶ 9472] 355 F. Supp. 325 (E.D. Penn. 1973), did not hold that separate assessment was mandatory in order to find individual partners liable. However, the certificate of assessment against the partnership listed the individual partners as well. In the instant case, the certificate of assessment only listed the partnership.

The only case cited by the IRS is support of their argument is an unpublished decision. In *Young v. Riddell*, 60-1 USTC [ ]paragraph 9381 (S.D. Cal. 1959), the court held that:

> Where taxes are assessed against a partnership and under state law each member of the partnership is jointly and severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability; their liability arises as a matter of state law.

The Ninth Circuit decision which affirmed the lower court's ruling did not address the issues before the Court at this time. *See Young v. Riddell* [60-2 USTC ¶ 15,322], 283 F.2d 909 (9th Cir. 1960). The Court's holding was focused on the fact that a dormant partner is also liable for the debts of a partnership.

Based upon the foregoing, the Court finds that the Debtors, as general partners, are not bound by the assessment of the partnership.

B. The statute of limitations bars collection of the partnership tax liability from the Debtors.

Section 6501(a) provides that "the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed . . ." Section 6501(9). The partnership taxes were incurred between 1992 and 1995 and were assessed against the partnership between February, 1994 and November, 1996. Since the Debtors, as individual partners, were not assessed within the three year statute of limitations, collection is barred. See Section 6501(a).

C. The Debtors have met their burden to defeat the partnership portion of the IRS claim.

Title 11 U.S.C. Section 502(a) provides that "a claim or interest, proof of which is filed under Section 501 of this title, is deemed allowed, unless a party in interest . . . objects." A proof of claim "executed and filed in accordance with [the Bankruptcy Rules constitutes] *prima facie* evidence of the validity and amount of the claim." Federal Rule of Bankruptcy 3001(f). "The debtor or trustee has the burden of presenting evidence to rebut this *prima facie* validity." *In re MacFarlane*, 83 F.3d 1041, 1044 (9th Cir.1996). The objecting party must show facts which would tend to defeat the claim by "probative force equal to that of the allegations of the proofs of claim themselves." *In re Holm*, 931 F.2d 620, 623 (9th Cir. 1991).

If that burden is met, the creditor must present evidence to prove the claim. The claimant must prove the validity of the claim by a preponderance of the

evidence. "The ultimate burden of proof therefore is on the creditor." *MacFarlane*, 83 F.3d at 1044.

In the instant case, the Debtors have met their burden of proof as to the portion of the claim relating to partnership tax liability. Therefore, the Court sustains the Debtors' claim objection in the amount of $403,428.22.[6]

Of the remainder, $21,600.80 is apportioned to taxpayer identification number 380-40-7057, which is Debtor Francesco Briguglio's social security number. Debtors have not presented any evidence to dispute the validity of this portion of the claim. Therefore, Debtors have not defeated the *prima facie* evidence of the validity and amount of the claim. The Court overrules the Debtors' claim objection in the amount of $21,600.80.

Finally, the remaining portion of the claim consists of an unsecured priority claim in the amount of $1,501.31 owed by taxpayer identification number 95-6537344 and an unsecured general claim for penalties in the amount of $872.41. Again, Debtors have not presented any evidence to dispute the validity of this portion of the claim. Therefore, Debtors have not defeated the *prima facie* evidence of the validity and amount of the claim. The Court overrules the Debtors' claim objection in the amount of $2,373.72.

---

[6] The amount consists of:

1. secured claims in the amount of $403,264.06; and
2. an unsecured claim in the amount of $164.16.

III. Conclusion

Based upon the foregoing, the claim objection is sustained in part. The Court will prepare an order consistent with this memorandum of decision.

ORDER

Pursuant to the Court's Memorandum of Decision of this date in the matter referenced above, it is hereby

ORDERED that the Debtors' Objection to Claim of United States of America, Department of the Treasury, Internal Revenue Service is SUSTAINED in the amount of $403,428.22 and OVERRULED in the amount of $23,974.52.

APPENDIX F

STATUTORY APPENDIX

1. 11 U.S.C. 101 provides, in relevant part:

In this title—

* * * * *

(5) "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

* * * * *

(10) "creditor" means—

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

* * * * *

2. 11 U.S.C. 502 provides, in relevant part:

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition,

and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

* * * * *

3. 26 U.S.C. 3102 provides, in relevant part:

(a) Requirement

The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.
* * *

(b) Indemnification of employer

Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

* * * * *

4. 26 U.S.C. 3111 provides, in relevant part:

(a) Old-age, survivors, and disability insurance

In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))— * * *

5. 26 U.S.C. 3403 provides:

Liability for tax

The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment.

6. 26 U.S.C. 3404 provides:

Return and payment by government employer

If the employer is the United States, or a State, or political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, the return of the amount deducted and withheld upon any wages may be made by any officer or employee of the United States, or of such State, or political subdivision, or of the District of Columbia, or of such agency or instrumentality, as the case may be, having control of the payment of such wages, or appropriately designated for that purpose.

7. 26 U.S.C. 6201 provides, in relevant part:

(a) Authority of Secretary

The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law.
* * *

8. 26 U.S.C. 6203 provides:

Method of assessment

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment.

9. 26 U.S.C. 6501 provides, in relevant part:

(a) General rule

Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) * * *, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. For purposes of this chapter, the term "return" means the return required to be filed by the taxpayer (and does not include a return of any person from whom the taxpayer has received an item of income, gain, loss, deduction, or credit).

10. 26 U.S.C. 6502 provides, in relevant part:

(a) Length of period

Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 10 years after the assessment of the tax, or

* * * * *

If a timely proceeding in court for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes unenforceable.

11. Cal. Corp. Code § 16306 (West Supp. 2003) provides, in relevant part:

(a) Except as otherwise provided in subdivisions (b) and (c), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

* * * * *

* * * * *

12. Cal. Corp. Code § 16307 (West Supp. 2003) provides:

(a) A partnership may sue and be sued in the name of the partnership.

(b) Except as otherwise provided in subdivision (g) of Section 16306, an action may be brought against the partnership and any or all of the partners in the same action or in separate actions.

(c) A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner.

* * * * *

Supreme Court, U.S.
FILED
MAY 20 2003
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No. 02-1389

In the

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

ABEL COSMO GALLETTI and SARAH GALLETTI;
FRANCESCO BRIGUGLIO and ANGELA BRIGUGLIO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' QUESTION PRESENTED

Whether the United States must, within three years after the return was filed, either make a separate assessment against the partners individually or bring a court proceeding directly against the partners, to enforce the liability of partners for unpaid partnership payroll taxes pursuant to California law?

TABLE OF CONTENTS

RESPONDENTS' QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

COUNTER-STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. The IRS Fails to Distinguish between Liability and Collectability 4

A. The IRS has agreed that California law makes individual partners liable for partnership debt but fails to acknowledge that California law requires a judgment against the individual partner to satisfy partnership debt from the partner's assets. 4

B. An assessment is the equivalent of a judgment. 5

II. The IRS's argument wrongly applies this Court's reasoning in *Jersey Shore* which implies that assessment, notice, and demand are generally required for derivative liability. 7

III. The Government's assertion that there is a disparity amongst the courts of appeal is more illusory than real. 9

CONCLUSION 12

APPENDIX A 1a

TABLE OF AUTHORITIES

Cases:

Bull v. United States, 295 U.S. 247 (1935) 5

Detrio v. United States., 264 F. 2d 658 (5th Cir. 1959) 4, 10, 11

Doerge v. United States., 181 B.R. 358 (S.D.Ill. 1995) 5

Fazzi v. Peters, 68 Cal. 2d 590 (1968) 4

Jersey Shore State Bank v. United States 479 U.S. 442, (1997) 3, 7

Remington v. United States, 210 Fed. 3rd 281 (5th Cir. 2000) 10

United States. v. Botefuhr, 309 F.3d 1263 (10th Cir. 2002) 11

United States v. Wright, 57 F.3d 561 (7th Cir.) 11

Valley National Bank of Arizona v. A.E. Rouse & Co., 121 F. 3rd 1332, 1336 (9th Cir. 1997) 4

Statutes:

26 U.S.C. §3505 ..... 7, 8, 9, 13

26 U.S.C. §3505(a) 7

26 U.S.C. §3505(b) 7, 8

26 U.S.C. §6203 ..... 1, 6

26 U.S.C. §6213 6

26 U.S.C. §6213(c) 6

26 U.S.C. §6303 5

26 U.S.C. §6303(a) 7, 8, 9

26 U.S.C. §6324 ..... 11, 12

26 U.S.C. §6501 ..... 2, 12

26 U.S.C. §6501(a) 5

26 U.S.C. §6502 ..... 5, 12

26 U.S.C. §6672 10

Cal. Corp. Code §16306 2

Cal. Corp. Code §16307(c) 2, 4, 9

No. 02-1389

In the
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UNITED STATES OF AMERICA,
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ABEL COSMO GALLETTI AND SARAH GALLETTI;
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

The Gallettis and the Briguglios ("Respondents") were general partners of Marina Cabrillo Partners ("the partnership"). From 1992 through 1995, the partnership failed to pay the total due in federal employment taxes, and the Internal Revenue Service ("IRS") made timely assessments against the partnership pursuant to 26 U.S.C. 6203.

The Respondents filed voluntary Chapter 13 Petitions in the Bankruptcy Court. The IRS filed Proofs of Claim in the Respondents' personal bankruptcy cases in early 2000 to recover the unpaid federal employment taxes owed by the partnership, almost eight years after the taxes were first due; $395,006.37 against the Gallettis and $427,402.74 against the Briguglios. Over 60% of the claims were for interest and penalties accrued these many years. Pet. App. p.19a, 32a.

The Respondents objected to the claims on the grounds the IRS had assessed only the partnership, not the individual partners, and that the statute of limitations for assessment or filing suit had run. The Respondents agreed that under California Corporations Code §16306, all partners are liable jointly and severely for the obligations of the partnership; however, the judgment against a partnership could not be satisfied from an individual partner's assets unless a judgment had been obtained against the partner. California Corporations Code §16307(c). Pet. App. p.15a, 50a.

The government asserted that its assessment against the partnership was timely and extended the time for collection of the taxes from the Respondents individually.

The Bankruptcy Court sustained the Respondents' objections to the IRS' Proof of Claims because the IRS had failed to assess the partners individually within the three year period provided by 26 U.S.C. 6501. Pet. App. p.62a-67a.. The District Court and the Court of Appeals affirmed the Bankruptcy Court's decision. All of the lower courts concluded that since the IRS had not obtained a judgment against the Respondents and the time for filing suit had expired, the

individual partners could not then be held liable for the tax debt of the partnership pursuant to California law.

REASONS FOR DENYING THE WRIT

The decision by the Ninth Circuit Court of Appeals is correct. The IRS has correctly applied California law to determine liability of the individual partners for the partnership debt, but has failed to consider the requirement of a prior judgment before proceeding with collection as California law requires.

The IRS' argument fails to apply this Court's reasoning in *Jersey Shore State Bank, v. U.S.*, 479 U.S. 442 (1987) which implies that assessment and notice is required for partner derivative liability prior to collection under principles of fairness and due process absent mitigating factors (such as are present in derivative liability of a lender who provides funding for wages).

The IRS also overstates the conflict between the Courts of Appeal. The cases which have been cited in Appellant's Petition are clearly distinguishable. The apparent conflict can be readily explained.

I.
THE IRS FAILS TO DISTINGUISH BETWEEN LIABILITY AND COLLECTABILITY

A. The IRS has agreed that California law makes individual partners liable for partnership debt but fails to acknowledge that California law requires a judgment against the individual partner to satisfy partnership debt from the partner's assets.

In 1968, the California Supreme Court solidified the doctrine that no judgment for a partnership debt can be rendered against an individual partner without that partner being individually named and served in the lawsuit. *Fazzi v. Peters*, 68 Cal. 2d 590 (1968). This decision was based upon the common law principle that a judgment may not be entered either for or against one who is not a party to an action. This rule of law has been codified under California Corporation Code §16307(c). This principle is a matter of procedural due process. "A contrary rule would raise constitutional problems." *Valley National Bank of Arizona v. A.E. Rouse & Co.*, 121 F. 3rd 1332, 1336 (9th Cir. 1997). This principle has also been recognized in the Fifth Circuit which found that the liability of a partner requires a legal proceeding in which the individual partner is personally served with process or notice so that he has an opportunity to contest the claim on its merits. *Detrio v. U.S.*, 264 F. 2d 658, 661 (5th Cir. 1959). The IRS cannot base its right to collect against a partner's assets on state law principles and then ignore the state law due process requirements for collection.

B. An assessment is the equivalent of a judgment.

This Court has said: "[T]axes are the life-blood of government and their prompt and certain availability an imperious need..... the assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt.....The assessment supercedes the pleading, proof and judgment necessary in an action at law, and has the force of such a judgment." *Bull v. U.S.*, 295 U.S. 247, 260 (1935). "The purpose of an assessment is to place the amount of taxes owed by the taxpayer on the government's books. It does not create the tax liability, but merely operates in the nature of a judgment and this allows for collection of the tax liability." *Doerge v. U.S.*, 181 B.R. 358, 363 (S.D.Ill. 1995). State law determines liability. Assessment starts collection. The IRS has the option of proceeding without assessment by filing a lawsuit against the individual partners within three years after the return was filed. 26 U.S.C. 6501(a). If the IRS chooses the assessment option pursuant to 26 U.S.C. 6502, the IRS has an additional ten years after the assessment to collect by levy or by proceeding in court. This could result in a thirteen year period, after the return was originally filed, before the IRS brings a lawsuit or moves to collect the taxes as well as interest and penalties which have been accruing this entire period.

The law provides certain procedural due process safeguards for the taxpayer when the IRS chooses to use the assessment option. Assessment triggers these procedural safeguards. Pursuant to 26 U.S.C. 6303, within sixty days from the date of assessment, the IRS is

required to provide the assessed party with notice of the assessment and demand for payment. Under §6203, the assessed taxpayer has the right to demand a copy of the record of assessment. A taxpayer has only ninety days after the notice of deficiency is mailed to petition a tax court for a redetermination of the amount assessed pursuant to 26 U.S.C. 6213. A taxpayer who is not separately assessed, or does not know that a particular entity with which he or she was related has been assessed, may loose these rights including the right to challenge the assessment in tax court. 26 U.S.C. 6213(c). Without the §6203 notice following assessment, years may go by as interest and penalties mount drastically before a partner finds out that his or her former partnership has been assessed. The IRS has ten years from assessment to collect these taxes by lien or levy without further warning.

A policy of both (1) concern for fairness and (2) consideration for procedural due process has been the impetus for Congress to establish these statutory protections within the IRS Code ("IRC"). These same concerns are evident in state law which requires notice and an opportunity to defend before a partner's individual assets can be attached in satisfaction of partnership debt. The IRS's interpretation of the law would remove these protections which were clearly provided by the legislature.

II.
THE IRS' ARGUMENT WRONGLY APPLIES THIS COURT'S REASONING IN *JERSEY SHORE* WHICH IMPLIES THAT ASSESSMENT, NOTICE, AND DEMAND ARE GENERALLY REQUIRED FOR DERIVATIVE LIABILITY.

In *Jersey Shore State Bank v. U.S.* 479 U.S. 442, (1997) this Court, in a unanimous opinion, examined whether the government must give post assessment notice and demand for payment pursuant to §6303(a) to a lender liable for the repayment of employment taxes. Congress created a special statutory scheme to establish liability against lenders and sureties who loaned funds to employers for the sole purpose of paying wages. Pursuant to §3505(a), if a lender or surety who is not an employer pays wages directly to an employee at the request of the employer, that lender or surety is liable directly to the government in an amount equal to the taxes plus interest which should have been deducted and withheld. The lender is not liable for the employer's share of unpaid social security taxes. Pursuant to §3505(b), if the lender or surety supplies funds to the account of an employer for the specific purpose of paying wages to the employees, with "actual notice or knowledge" that the employer will not pay the withholding taxes, the lender or surety is liable for the withholding tax which was not paid plus interest *but only up to 25% of the amount supplied to the employer.*

This Court resolved a conflict between the circuits and found that §6303(a) notice and demand was not required prior to instituting a civil action against the lender pursuant to §3505. This Court's entire opinion was predicated upon an analysis based upon *fairness.* The Court decided it was not *unfair* that a tax liability

notice under §6303(a) be given to the employer but not the lender, because the employer is subject to the government's summary collection procedures, but the IRS can only collect against the lender by filing a civil suit. Thus, this Court reasoned that the employer has a far greater need for an assessment notice than third-party lenders who are not subject to summary collection.

This Court also noted that a §6303(a) notice may not be particularly applicable to a third-party lender because the notice only states the total amount of overdue taxes assessed against the employer which may very well be far greater than the actual liability of the lender under §3505. The lender's liability would equal the amount under the notice only when the lender provided payroll financing throughout the entire time period indicated in the assessment, and then it would probably overstate the amount due if the lender were liable under §3505(b) which limits the lender's exposure to 25% of the funds supplied to the employer. In addition, this Court considered that a lender would not be liable under §3505 "unless it either 'pays wages directly' to an employee or supplies funds for the wages with 'actual notice or knowledge' that the employer is either unable to make timely payment of the required withholding taxes or has no intention of doing so." *Jersey Shores* at 448. Therefore, the lender could be alerted to its liability when it first began providing funds for payment of employee "net wages" but not providing funds for payment of withholding taxes. The lender could protect itself against future liability by including such amounts in its loans and taking adequate security. It also could establish its premiums considering this risk of liability.

This Court's analysis was based on the finding of the above special mitigating *fairness factors* which are not present in the derivative liability of partners for partnership debt. The IRS can seek enforcement against partners by either summary collection procedures or by filing a civil suit. Unlike a lender, it is not necessary that the IRS show that a partner paid wages directly to partnership employees or had actual notice or knowledge that the partnership employer did not intend to pay the taxes. Further, there are no liability limitations to a partner, so a §6303(a) notice would accurately reflect the partner's liability (unlike a lender). Notice would provide the partner with due process and enable the partner to dispute the debt both administratively and in tax court.

If assessment, notice and demand were not required to enforce all types of derivative liability (including partner liability) as the IRS argues, one could infer that this Court's analysis involving fundamental fairness would not have been necessary for §3505 liability in *Jersey Shore*.

III.
THE GOVERNMENT'S ASSERTION THAT THERE IS A DISPARITY AMONGST THE COURTS OF APPEAL IS MORE ILLUSORY THAN REAL

The Ninth Circuit Court of Appeals found that: "A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from the partner's assets unless there is also a judgment against the party." Pet. App. p.16a citing Cal. Corp. Code §16307(c). Therefore, although each individual partner is liable for the debts of the partnership under California law, a

claim against the partnership does not automatically give rise to a right to collect against the individual partners. The creditor must first obtain a judgment against the partner before collecting on the debt for which the partner is jointly and severely liable. Pet. App. p.16a. Liability and collectability are not congruous.

The Government asserts, Pet. p.7, that the Fifth Circuit. is in disagreement and cites *Remington v. United States*, 210 Fed. 3rd 281 (5th Cir. 2000). The issue in *Remington* was whether the penalty provision for responsible parties pursuant to 26 U.S.C. 6672 preempted state law making partners jointly and severally liable for partnership debts. The partner argued that he was not the responsible party and, therefore, not liable. The Fifth Circuit found that §6672 is a "catch all," and applies in addition to other tax code provisions. Section 6672 does not preempt state law. *Remington* merely holds that partners, whether responsible parties or not, may be liable for withholding taxes of the partnership. This issue is not in dispute here. The issue in the case at bar is whether or not the IRS can proceed against an individual partner for collection of partnership debt, after the three year statute of limitations has run, without assessing the individual partner? The record doesn't indicate whether the IRS assessed the taxes against the partner individually in *Remington*. That was not before the Court. The Fifth Circuit had decided *Detrio v. U.S.* 264 F. 2d 658 (5th Cir. 1959), a case for recovery of excess partnership profits pursuant to the War Contracts Renegotiation Act, in which the Government sought payment from a former partner individually. The Fifth Circuit said: "In partnership law the establishment of the personal unlimited liability of the general partner

requires a legal proceeding in which (whether local practice requires him to be named personally or not) the individual partner thus pursued is personally served with process or notice. This is so because he must have an opportunity to contest the claim on its merits." *Id.* at 661. The Fifth Circuit found that the partner was never served with any notice of the proceedings, yet the government knew the name and residence of each of the partners. Therefore, adhering to the principles of procedural due process, the partner could only be liable to the extent he held partnership assets and could not be divested of his personal assets.

The Government cites the Seventh Circuit case of *U.S. v. Wright*, 57 F.3d 561 (7th Cir.) in support of their assertion of conflict between other courts of appeal and the Ninth Circuit. The issue in *Wright* was whether the statute of limitations should be tolled as to the individual partner during the pendency of a bankruptcy filing by the partnership alone. The record in the District Court case, *U.S. v. Wright*, 868 F. Supp. 1070 (S.D.Ind 1994), indicated that the assessments were made against the partners as well as the partnership. The Seventh Circuit held the statute of limitations had been tolled against both the partnership and the individual partners, during the partnership's bankruptcy, but it did not address the assessment issue. The Ninth Circuit discussed the *Wright* case in the opinion below and found that it was not applicable because assessment had been made and notice given to the partners individually.

The Tenth Circuit case of *U.S. v. Botefuhr*, 309 F.3d 1263 (10th Cir. 2002) involves the application of §6502 to §6324 which imposes liens for estate and gift tax deficiencies. The policy behind §6324 liability is

entirely different from that underlying partner liability for partnership debt. Under §6324, the donee assumes liability to the extent of the value of the gift already received. Since the tax is limited to a gift already received, the donee should be aware of potential tax liability and would be no worse off than the loss of property already received. However, partners have unlimited liability for partnership debt and without assessment, notice and demand individually directed, individual partners would have no opportunity to contest the amount of the tax debt. They would be subject to unlimited administrative collection against the entirety of their personal assets.

The Government attempts to mislead and confuse this Court in their analysis of the lower court decisions by pretending that there is only one limitation period applicable in this case. The Government attempts to focus solely on the ten year collection period pursuant to 26 U.S.C. §6502 (which is not at issue in this case). They completely ignored the three year assessment or notice period under 26 U.S.C. §6501 (which is the major issue in this case). The Government claims that assessment against the partnership extends the limitation period for collection to ten years. However, as the Ninth Circuit has correctly found, the assessment against the partnership extended the collection period against the partnership only. Pet. App. p.16a.

CONCLUSION

Before the Government can collect a tax debt against a liable party, the Government must first provide notice to all parties who may be liable. Congress has

determined that this notice may be provided by way of an assessment, by the filing of a civil action, or by the imposition of a penalty against a "responsible party" under IRC §6672. Other than liability pursuant to IRC §3505 (against a lender or surety who provides funds for the payment of wages), the IRS must, prior to commencement of tax collection against a liable party, provide notice, pursuant to section 6501, within the three year period after the return was filed. There is no dispute that the IRS failed to use any of these three methods to timely provide notice of the tax debt to the Respondents. There is also no dispute that the three year assessment and notice period ran prior to the commencement of the Respondents' bankruptcies. Thus, the IRS claim was time barred before the underlying Respondents' bankruptcies, and the IRS's claims were properly disallowed by the Bankruptcy Court.

The policy in favor of fundamental fairness and Congress's concern for procedural due process led to the present statutory scheme embodied in the Internal Revenue Code. The Ninth Circuit's careful analysis of the provisions in the IRC reveals that individual partners derivatively liable for partnership debt must be assessed as "taxpayers" and given notice and demand for payment prior to summary collection of their assets and prior to the extension of the statute of limitations for an additional ten years for either a law suit or administrative collection, without any notice whatsoever.

As Plato counseled at the end of the last book of *The Republic*: "pursue justice with wisdom in every way." Respondents ask no less of this Court and ask that the Government's Petition for Writ of Certiorari to

the Ninth Circuit be denied in the interests of fundamental fairness and concern for procedural due process, as the law justly demands.

RESPECTFULLY SUBMITTED,

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APPENDIX A
STATUTORY APPENDIX

1. 26 U.S.C. §6303 provides, in relevant part:

(a) General Rule

Where it is otherwise not provided by this title, the Secretary shall, as soon as practicable, and within sixty (60) days, after the making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person or shall be sent by mail to such person's last known address.

2. 26 U.S.C. §6324 provides, in relevant part:

(b) Lien for Gift Tax

Except as otherwise provided in subsection (c), unless the gift tax imposed by chapter 12 is sooner paid in full or becomes unenforceable by reason of lapse of time, such tax shall be a lien upon all gifts made during the period for which the return was filed, for 10 years from the date the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift.*******

3. 26 U.S.C. §6672 provides in relevant part:

(a) General Rule.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title

who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.*****

(b) Preliminary notice requirement.

(1) In general. No penalty shall be imposed under subsection (a) unless the Secretary notifies the taxpayer in writing by mail to an address as determined under section 6212(b) or in person that the taxpayer shall be subject to an assessment of such penalty.

Supreme Court, U.S.
FILED
JUN 3 - 2003
OFFICE OF THE CLERK

No. 02-1389

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL COSMO GALLETTI AND SARAH GALLETTI;
FRANCESCO BRIGUGLIO AND ANGELA BRIGUGLIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

THEODORE B. OLSON
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Counsel of Record
Department of Justice
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(202) 514-2217

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UNITED STATES OF AMERICA, PETITIONER

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REPLY BRIEF FOR THE PETITIONER

1. This case was brought by the United States in bankruptcy court to enforce the derivative liability of the individual partners for the tax debt of their partnership. Because respondents had filed for bankruptcy, the United States was barred by the automatic stay from bringing suit outside of bankruptcy court to enforce this derivative liability. 11 U.S.C. 362(a)(1). When the government asserted its claims in the bankruptcy proceedings (11 U.S.C. 501(a)), respondents exercised their right to object to the allowance of the claims (11 U.S.C. 502(a)). After such objections are filed, the bankruptcy court is to determine the validity and amount of the government's claim "after notice and a hearing." 11 U.S.C. 502(b). The adjudication and determination of a disputed claim in a bankruptcy case constitutes a judgment with res judicata effect. See,

e.g., *Siegel* v. *Federal Home Loan Mortgage Corp.*, 143 F.3d 525, 528-529 (9th Cir. 1998); *In re Baudoin*, 981 F.2d 736, 742 (5th Cir. 1993).

Such proceedings in bankruptcy court obviously comport with the requirement of California law that there be a "judgment against the partner" before the liability of a partnership may be collected "from a partner's assets" (Cal. Corp. Code § 16307(c) (West Supp. 2003)). Respondents' strained assertion that a bankruptcy case may not proceed against the partners because California law requires that "a judgment against the individual partner" be obtained before collection of the partnership debt occurs (Br. in Opp. 4) is transparently circular and manifestly incorrect. The extraordinary breadth of respondents' contention is noteworthy. If respondents new argument were accepted, the derivative liability of a partner for *any* type of partnership debt could never be enforced for, on respondents' theory, the partner could simply commence a bankruptcy case and thereby preclude the entry of any judgment in a pending suit or any recovery on the claim thereafter filed in bankruptcy. There is obviously no support for that broad proposition, and respondents cite none for it.

The question presented in the petition is whether, in order to enforce the derivative liability of partners for the tax debts of their partnership, the United States must, as a matter of federal law, make a separate assessment of the taxes owed by the partnership against each of the partners directly. As is explained in the petition (Pet. 15-16), the California statutes cited by respondents do not address or purport to govern that question of federal tax administration.

2. Respondents also err in their asserted reliance (Br. in Opp. 7-8) on *Jersey Shore State Bank* v. *United States*, 479 U.S. 442 (1987). That case addressed a narrow question under Section 3505 of the Internal Revenue Code, which creates a liability for lenders who (i) pay wages to the employees of borrowers and (ii) do not withhold required amounts of federal employment taxes from the wages paid. 26 U.S.C. 3505(a). That liability is created by federal statute, and it does not rest on general principles of derivative liability. The question addressed in *Jersey Shore* was whether, as a prerequisite to enforcing this statutory liability of the lender, the United States must provide *the lender* with a notice of the assessment for employment taxes that was *issued to the employer*. The Court held that notice of the assessment issued to the employer need not be sent to the lender as a condition of enforcing the separate statutory tax liability of the lender. 479 U.S. at 447-449.

Nothing in that decision supports respondents' assertion that assessment is "generally required" to enforce a "derivative liability" (Br. in Opp. 7). To the contrary, the decisions of this Court and of other courts of appeals have consistently held that the derivative liability of a third party may be enforced based on the assessment of the primarily liable party and "without assessment" of the tax against the party whose liability was only derivative. *Leighton* v. *United States*, 289 U.S. 506, 508 (1933); see cases cited Pet. 11-16.

3. Respondents nonetheless assert that the conflict among the courts of appeals that is created by the decision in this case is only "illusory" (Br. in Opp. 9). In making that contention, respondents simply fail to acknowledge that the decision in this case directly conflicts with the longstanding holding of the Federal Circuit that a separate assessment is *not* required to collect a tax from a party who is derivatively liable for

it. *Anderson* v. *United States*, 15 F. Supp. 216, 225 (Ct. Cl. 1936), cert. denied, 300 U.S. 675 (1937); see Pet. 11-13.

For the reasons set forth in detail in the petition (Pet. 12-17), respondents also err in their effort to minimize the conflict with other circuit decisions. For example, respondents incorrectly state that the record in *United States* v. *Wright*, 868 F. Supp. 1070 (S.D. Ind. 1994), rev'd, 57 F.3d 561 (7th Cir. 1995), showed that "assessments were made against the partners as well as the partnership" (Br. in Opp. 11). On the contrary, the government maintained in *Wright* "that the assessments were levied against the partnership only and not against any of the partners individually." 868 F. Supp. at 1071 n.1. The district court in *Wright* stated that whether an assessment was made against the partners was "not material" to its resolution of the case. *Ibid.* And, as noted in the petition (Pet. 16 n.9), the Seventh Circuit in *Wright*, in a holding that directly conflicts with the decision in this case, expressly held that "suits against persons derivatively liable for taxes are timely, or not, according to the rules for timeliness of suits against taxpayers." 57 F.3d at 564.

Respondents also completely miss the point of *United States* v. *Botefuhr*, 309 F.3d 1263 (10th Cir. 2002). The decision in that case did not turn on the fact that the liability of the donee under 26 U.S.C. 6324(b) was limited to the value of the gift. Instead, it turned on a straightforward application of the legal principle that a "suit [that] would be timely [if] brought against the" primarily liable taxpayer is also "considered timely against the [derivatively liable] donee or transferee." 309 F.3d at 1277.

4. Respondents do not dispute that the conflict that now exists among the circuits will cause improper "ine-

qualities in the administration of the revenue laws." *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948). Partners who happen to reside in different circuits will receive different treatment based solely on the location of their residence. Resolution of the conflict among the circuits created by the decision in this case is thus warranted by the importance, in a national system of taxation, of "ensur[ing] as far as possible that similarly situated taxpayers pay the same tax." *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 544 (1979).

* * * * *

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

THEODORE B. OLSON
Solicitor General

JUNE 2003

Supreme Court, U.S.
FILED

SEP 4 2003

OFFICE OF THE CLERK

No. 02-1389

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UNITED STATES OF AMERICA, PETITIONER

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ABEL COSMO GALLETTI AND SARAH GALLETTI; AND
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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: MAR. 20, 2003
CERTIORARI GRANTED: JUNE 23, 2003

TABLE OF CONTENTS*

Chronological List of Relevant Docket Entries:
a. United States Bankruptcy Court for the Central District of California:
i. Case No. 99-48587—*In Re Abel Cosmo Galletti and Sarah Gallettim*, Debtors 1
ii. Case No. 00-13574—*In Re Francesco Briguglio and Angela Briguglio*, Debtors 36
b. United States District Court for the Central District of California:
i. Case No. 00-CV-753—*United States* v. *Abel Cosmo Golletti and Sarah Galletti* 64
ii. Case No. 00-CV-842—*United States* v. *Francesco Briguglio and Angela Briguglio* 74
c. United States Court of Appeals for the Ninth Circuit:
i. Case No. 01-55953—*United States* v. *Abel Cosmo Galletti; Sarah Galletti* 84
ii. Case No. 01-55954—*United States* v. *Francesco Briguglio; Angela Briguglio* 92
United States' Proofs of Claim:
a. Case No. 99-48587—*In Re Galletti* 100
b. Case No. 00-13574—*In Re Briguglio* 102

* The opinions of the bankruptcy court, the district court, and the court of appeals are printed in the appendix to the petition for a writ of certiorari and have not been reproduced here.

UNITED STATES BANKRUPTCY COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

No. 99-48587

IN RE ABEL COSMO GALLETTI AND SARAH GALLETTI,
DEBTORS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/20/1999	1	Voluntary petition under chapter 13 [EOD 10/21/1999] [RSI]
10/20/1999	2	Statement of related cases [EOD 10/21/1999] [RSI]
10/20/1999	3	Notice of available chapters [EOD 10/21/1999] [RSI]
10/20/1999	4	Summary of schedules [EOD 10/21/1999] [RSI]
10/20/1999	5	Schedule A filed [EOD 10/21/1999] [RSI]
10/20/1999	6	Schedule B filed [EOD 10/21/1999] [RSI]
10/20/1999	7	Schedule C filed [EOD 10/21/1999] [RSI]
10/20/1999	8	Schedule D filed [EOD 10/21/1999] [RSI]
10/20/1999	9	Schedule E filed [EOD 10/21/1999] [RSI]

DATE	DOCKET NUMBER	PROCEEDINGS
10/20/1999	10	Schedule F filed [EOD 10/21/1999] [RSI]
10/20/1999	11	Schedule G filed [EOD 10/21/1999] [RSI]
10/20/1999	12	Schedule H filed [EOD 10/21/1999] [RSI]
10/20/1999	13	Schedule I filed [EOD 10/21/1999] [RSI]
10/20/1999	14	Schedule J filed [EOD 10/21/1999] [RSI]
10/20/1999	15	Declaration concerning debtor's schedules [EOD 10/21/1999] [RSI]
10/20/1999	16	Statement of financial affairs [EOD 10/21/1999] [RSI]
10/20/1999	17	Verification of creditor matrix [EOD 10/21/1999] [RSI]
10/20/1999	18	Matrix (mailing list) [EOD 10/21/1999] [RSI]
10/20/1999	19	Signature(s) page 2 of petition form B1 for attorney [EOD 10/21/1999] [RSI]
10/20/1999	20	Attorney's state bar number on page 1 of petition form [EOD 10/21/1999] [RSI]

DATE	DOCKET NUMBER	PROCEEDINGS
10/20/1999	21	Disclosure of attorney fees [EOD 10/21/1999] [RSI]
10/20/1999	22	ORDER to comply with bankruptcy rule 1007 and notice of intent CH13 Plan-Motn Avoid Lien [EOD 10/21/1999] [RSI]
10/20/1999	23	Certificate of mailing (3 copies) RE: Item #22 [EOD 10/21/1999] [RSI]
10/22/1999	24	Notice of 341a meeting (requested from BNC) hearing on 12/03/1999 at 11:30 a.m. at 221 N. Figueroa St., Ste. 102, Los Angeles, CA 90012 [EOD 10/22/1999] [LBI]
10/22/1999	24A	Notice of confirmation hearing hearing on 01/10/2000 at 09:00 a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 RE: Item #24 [EOD 10/22/1999] [LBI]
10/27/1999	25	Certificate of mailing (21 copies) RE: Item #24 [EOD 10/28/1999] [BNC]
11/10/1999	26	Chapter 13 plan with Proof of Service RE: Item #22 [EOD 11/12/1999] [GLW]

DATE	DOCKET NUMBER	PROCEEDINGS
		to relieve debtors of requirement of paragraph 23 B of amended General Order No. 1 (Appendix 1 of the Local Bankruptcy Rules of Practice and Procedure for the Central District of California) to make post-petition payments to Merchant's Bank of California, Finova Financial Institution, and Gregory S. Abrams, collateral pool trustee; memorandum of points and authorities; declaration of David R. Haberbush (562) 435-3456 hearing on 01/10/2000 at 09:30 a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 [Disposed] [EOD 11/19/1999] [CYK]
11/24/1999	28	Errata re time of hearing for motion to relieve debtors of requirement of paragraph 23 B of amended general order no. 1 (appendix I of the Local Bankruptcy Rules of Practice and Procedure for the Central District of California) to

DATE	DOCKET NUMBER	PROCEEDINGS
		make post-petition payments to Merchant's Bank of California, Finova Financial Institution, and Gregory S. Abrams, Collateral Pool Trustee; with proof of service; filed by David R. Haberbush, attorney for debtor RE: Item #27 [EOD 12/02/1999] [LRL]
12/08/1999	29	Amendment to schedule(s) with proof of service RE: Item #4 [EOD 12/09/1999] [CAC]
12/08/1999	29A	Schedule G filed RE: Item #11 [EOD 12/09/1999] [CAC]
12/08/1999	29B	Schedule I filed RE: Item #13 [EOD 12/09/1999] [CAC]
12/08/1999	29C	Schedule J filed RE: Item #14 [EOD 12/09/1999] [CAC]
12/10/1999	30	Request for judicial notice in support of Notice of Motion & Motion to value the Secured Interests, pursuant to 11 USC 506(a) & Federal Bankruptcy rule of procedure 3012, of: (a) Gregory S. Abrams collateral Pool

DATE	DOCKET NUMBER	PROCEEDINGS
		trustee; (b) Merchants Bank of California; (c) State of California, Board of Equalization; (d) Trust Company Bank; (e) American First Federal, Inc.; (f) State of California, Employment Development Department; (g) Sysco Food Services of Los Angeles, Inc.; (h) Los Angeles County Tax Collector; and (i) Great Five Oceans, Inc.; Hearing date: 01-10-2000 at 9 a.m. [EOD 12/13/1999] [JK]
12/10/1999	31	Motion to value the secured interests, Pursuant to 11 USC 506(a) & federal bankruptcy rule of procedure 3012 of: (a) Gregory S. Abrams collateral pool trustee; (b) Merchants Bank of California; (c) State of California, Board of Equ[a]lization; (d) Trust Company Bank; (e) American First Federal, Inc.; (f) State of California, Employment Development Department; (g) Sysco Food

DATE	DOCKET NUMBER	PROCEEDINGS
		Services of Los Angeles, Inc. (h) Los Angeles County Tax Collector; and (i) Great Five Oceans, Inc. hearing on 01/10/2000 at 09:00 a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 [Disposed] RE: Item #30 [EOD 12/13/1999] [JK]
12/10/1999	31A	Notice of motion/application RE: Item #31 [EOD 12/13/1999] [JK]
12/10/1999	31B	Memorandum of points and authorities RE: Item #31 [EOD 12/13/1999][JK]
12/10/1999	31C	Declaration of Abel C. Galletti Glenn M. Mitchell RE: Item #31 [EOD 12/13/1999] [JK]
12/28/1999	32	Response of County of Los Angeles to debtor's motion to value the secured interests. Filed by Elizabeth M. Cortez, Principal Deputy County Counsel. With proof of service. RE: Item #31 [EOD 12/29/1999] [ES]

DATE	DOCKET NUMBER	PROCEEDINGS
01/03/2000	33	Amendment/Amended/First amended notice of Errata re time of hearing for motion to relieve debtors of requirement of paragraph 23 B of Amended General Order No. 1 (Appendix I of the Local Bankruptcy Rules of Practice and Procedure for the Central District of California) to make post-petition payments to merchant's Bank of California, Finova Financial Institution, and Gregory S. Abrams, collateral pool Trustee, filed by David R. Haberbush, Attorney for Debtors. With proof of service. [EOD 01/04/2000] [RMA]
01/12/2000	34	Hearing held on 1/10/00 Re: Confirmation of chapter 13 plan; CONTINUED TO 3/20/00 @ 9:00 A.M. RE: Item #24A [EOD 01/12/2000] [CR3]

DATE	DOCKET NUMBER	PROCEEDINGS
01/12/2000	35	Hearing held on 1/10/00 Re: Motion to relieve debtors of requirement of paragraph 23 B of amended General order No. 1: GRANTED RE: Item #27 [EOD 01/12/2000] [CR3]
01/12/2000	36	Hearing held on 1/10/00 Re: Motion to value the secured interests; GRANTED RE: Item #31 [EOD 01/12/2000] [CR3]
01/25/2000	37	ORDER and notice of dismissal for failure to file schedules, statements, or plan with 180-day restriction (req. from BNC) "Chapter 13 Plan not timely filed - Due Date 11/4/99" RE: Item #22 [EOD 01/25/2000] [CAC]
01/28/2000	38	Certificate of mailing (21 copies) RE: Item #37 [EOD 01/31/2000] [BNC]
02/07/2000	39	Ex parte application/motion for order vacating dismissal of Chapter 13 bankruptcy case; memorandum of points and authorities; declaration of David R. Haberbush. Filed

DATE	DOCKET NUMBER	PROCEEDINGS
		by David R. Haberbush, attorney for debtors. [Disposed] RE: Item #37 [EOD 02/08/2000] [ES]
02/07/2000	39A	ORDER granting/approving ex parte motion for order vacating dismissal of case. IT IS FURTHER ORDERED that the continued hearing concerning confirmation of the Debtors' Chapter 13 Plan be and the same remains on calendar for March 20, 2000 at 9:00 am. IT IS FURTHER ORDERED that Debtors shall give all creditors, Chapter 13 Trustee, and all interested parties notice of this order and a separate notice that the continued hearing regarding confirmation of the Debtor's proposed Chapter 13 Plan remains on calendar as ordered hereby. With notice of entry. [EOD 02/08/2000] [ES] (DISPOSED) RE: Item #39 RE: Item #42 [EOD 07/20/2000] [LS2]

DATE	DOCKET NUMBER	PROCEEDINGS
02/08/2000	40	Notice and order vacating dismissal (& 180-day restriction) (requested from BNC) RE: Item #39A [EOD 02/08/2000] [ES]
02/11/2000	41	Certificate of mailing (21 copies) RE: Item #40 [EOD 02/14/2000] [BNC]
02/11/2000	42	Motion and notice to all creditors and other interested parties of court order; (1) Vacating order of dismissal of chapter 13 bankruptcy case; and (2) Re-setting hearing regarding confirmation of proposed chapter 13 plan, Filed by: David R. Haberbush, Esquire (562) 435-3456 hearing on 03/20/2000 at 09:00 a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 [Disposed] [EOD 02/16/2000] [CYK]
02/18/2000	43	Objection to claim and notice of motion/objection to claim No. 2, Filed by: Sysco Food Services; memorandum of points and authorities; dec-

DATE	DOCKET NUMBER	PROCEEDINGS
		laration of David R. Haberbush, Esquire (562) 435-3456 hearing on 03/20/2000 at 09:00 a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 [EOD 02/22/2000] [CYK]
02/25/2000	44	Objection to claim and notice of motion objection to claim No.1 Filed by L. A. County Tax Collector; memorandum of points and authorities; declaration of David B. Haberbush; declaration of Abel C. Galletti, Filed by: David R. Haberbush, Esquire (562) 435-3456 hearing on 03/20/2000 at 09:00 a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012[EOD 02/28/2000][CYK]
03/01/2000	45	Chapter 13 plan (First Amended), with proof of service RE: Item #26 [EOD 03/02/2000] [CCM]
03/06/2000	46	ORDER granting/approving motion for order relieving debtors of requirement of

DATE	DOCKET NUMBER	PROCEEDINGS
		paragraph 23(B) of amended general order No. 1 (Appendix I of the Local Bankruptcy Rules of Practice and Procedure for the Central District of California) to make post-petition payments to Merchant's Bank of California, Finova Financial Institution, and Gregory S. Abrams, Collateral Pool Trustee. With notice of entry. RE: Item #27 [EOD 03/07/2000] [ES]
03/06/2000	47	ORDER re: Motion (1) valuing secured interests, pursuant to 11 U.S.C. 506(a) and Federal Bankruptcy Rule of Procedure 3012 of: (a) Gregory S. Abrams, Collateral Pool Trustee; (b) Merchant's Bank of California; (c) State of California, Board of Equalization; (d) Trust Company Bank; (e) American First Federal, Inc.; (f) State of California, Employment Development Department; (g) Sysco Food Services of Los Angeles, Inc.; (h) Los

DATE	DOCKET NUMBER	PROCEEDINGS
		Angeles County Tax Collector; and (i) Great Five Oceans, Inc. SEE ORDER FOR TERMS. With notice of entry. RE: Item #31 [EOD 03/07/2000] [ES]
03/10/2000	48	Withdrawal re: Claim by County of Los Angeles. Amount: $4,117.38. Re: Parcel Number7561-027-022 for property address 2411 Daladier Drive, Rancho Palos Verdes. Filed by Elizabeth M. Cortez, attorney for County of Los Angeles. With proof of service. [EOD 03/13/2000] [ES]
03/22/2000	49	Hearing held on 3/20/00 Re: Confirmation of chapter 13 plan-CONTINUED TO 5/15/00 @10:00 A.M. RE: Item #34 [EOD 03/22/2000] [CR3]
03/22/2000	50	Hearing held on 3/20/00 Re: Objection to claim; GRANTED RE: Item #43 [EOD 03/22/2000] [CR3]

DATE	DOCKET NUMBER	PROCEEDINGS
03/22/2000	51	Hearing held on 3/20/00 Re: Motion vacating order of dismissal of chapter 13; VACATED; ORDER VACATING DISM, E. 2/8/00 RE: Item #42 [EOD 03/22/2000] [CR3]
04/03/2000	52	Objection to claim and notice of motion/objection to claim, filed by California State Board, David Haberbush, Esquire (562) 435-3456 hearing on 05/15/2000 at 11:00 a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 [EOD 04/04/2000] [CYK]
04/17/2000	53	Objection to claim and notice of motion/objection to claim of United States of America, Department of Treasury, Internal Revenue Service; memorandum of points and authorities; declaration of David R. Haberbush, Filed by: David R. Haberbush, Esquire (562) 435-3456 hearing on 05/15/2000 at 10:00

DATE	DOCKET NUMBER	PROCEEDINGS
		a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 [Disposed] [EOD 04/18/2000] [CYK]
05/04/2000	54	Objection of Trustee to plan confirmation and declaration in support. Filed by Edwina E. Dowell. RE: Item #45 [EOD 05/05/2000] [ES]
05/05/2000	55	ORDER disallowing claim(s) of Sysco Food Services. GRANTED. With notice of entry. [EOD 05/08/2000] [ES]
05/09/2000	56	Objection to confirmation of Chapter 13 Plan. Filed by Jennifer Witherell Crastz, attorney for Sysco Food Services of Los Angeles, Inc. With proof of service. RE: Item #45 [EOD 05/10/2000] [ES]
05/09/2000	57	Reply of Debtor to Trustee's objection to plan confirmation. Filed by David R. Haberbush, attorney for Debtors. With proof of service. RE: Item #54 [EOD 05/10/2000] [ES]

DATE	DOCKET NUMBER	PROCEEDINGS
05/11/2000	58	Reply to Sysco's objection to plan confirmation. Filed by David R. Haberbush, attorney for Debtors. With proof of service. RE: Item #56 [EOD 05/11/2000] [ES]
05/12/2000	59	Response of the United States of America to debtors' notice of motion/objection and motion/objection to claim of United States of America, Department of the Treasury, Internal Revenue Service. Filed by Daniel M. Whitley, special assistant U.S. attorney. With proof of service. RE: Item #53 [EOD 05/15/2000] [ES]
05/16/2000	60	Hearing held on 5/15/00 Re: Confirmation of Chapter 13 Plan-CONTINUED TO 6/19/00 @11:00 A.M. (IF DEBTOR GETS PAYMENT TO TRUSTEE BY 1:30 P.M. TODAY) RE: Item #49 [EOD 05/16/2000] [CR3]

DATE	DOCKET NUMBER	PROCEEDINGS
05/16/2000	61	Hearing held on 5/15/00 Re: Objection to claim; CONTINUED TO 6/19/00 @ 11:00 A.M. RE: Item #53 [EOD 05/16/2000] [CR3]
05/17/2000	62	Hearing held on 5/15/00 Re: Objection to Claim (Board of Equ[a]lization); GRANTED [EOD 05/17/2000] [CR3]
05/25/2000	63	ORDER disallowing claim(s) filed by California State Board of Equalization. GRANTED. With notice of entry. [EOD 05/26/2000] [ES]
06/05/2000	64	Declaration of Diane Campbell re proof of service by U.S. mail of: notice of motion/objection and motion/ objection to claim of United States of America, Department of the Treasury, Internal Revenue Service. RE: Item #53 [EOD 06/08/2000] [ES]
06/21/2000	65	Hearing held on 6/19/00 Re: Confirmation of Chapter 13 plan;CONTINUED TO 7/31/00 @11:00 A.M. RE: Item #60 [EOD 06/21/2000] [CR3]

DATE	DOCKET NUMBER	PROCEEDINGS
06/21/2000	66	Hearing held on 6/19/00 Re: Objection to claim; GRANTED AS TO STATE BOARD OF EQUALIZATION; U.S. TREASURY AND I.R.S. CONTINUED TO 7/31/00 @11:00 RE: Item #61 [EOD 06/21/2000][CR3]
06/21/2000	67	Hearing held on 6/19/00 Re: Amended motion for order authorizing modification to first amended chapter 13 plan; CONTINUED TO 7/31/00 @11:00 A.M. [EOD 06/21/2000] [CR3]
06/28/2000	68	Scheduling order re briefing and hearing on Debtors' motion/objection to claim of the United States of America, Department of the Treasury, Internal Revenue Service. The hearing on the Debtors' objection to the claim is continued to JULY 31, 2000 AT 11:00 AM. The Debtors shall have through and including July 3, 3000 to serve their points and authorities in support of the

DATE	DOCKET NUMBER	PROCEEDINGS
		motion. The Unites States of America shall have through and including July 17, 2000 to file and serve any points and authorities in response. With notice of entry. [EOD 06/29/2000] [ES]
07/03/2000	69	Supplemental memorandum of points and authorities in support of motion/objection to claim of United States of America, Department of the Treasury, Internal Revenue Service. Filed by Robert C. Hastie, attorney for Debtors. With proof of service. RE: Item #53 [EOD 07/05/2000] [ES]
07/12/2000	70	Chapter 13 plan and motion to avoid liens (SECOND AMENDED); With proof of service RE: Item #26 [EOD 07/13/2000] [DEO]
07/17/2000	71	Original signature page of Debtors and Debtors' Attorney in support of Second Amended Chapter 13 Plan and Motion to avoid liens, filed by David R. Haberbush,

DATE	DOCKET NUMBER	PROCEEDINGS
		Attorney for Debtors, Abel C. [Galletti] and Sarah Galletti. With proof of service. RE: Item #70 [EOD 07/18/2000] [RMA]
07/21/2000	72	Supplemental memorandum of points and authorities of United States in support of opposition to motion/objection to claim of United States of America, Department of Treasury, Internal Revenue Service. Filed by Ron S. Chun, Special Assistant U.S. Attorney. With proof of service. RE: Item #53 [EOD 07/24/2000] [ES]
07/28/2000	73	Reply to United States' supplemental memorandum of points and authorities in opposition to objection to claim of Internal Revenue Service. Filed by Robert C. Hastie, attorney for Debtors. With proof of service. RE: Item #72 [EOD 07/31/2000] [ES]

DATE	DOCKET NUMBER	PROCEEDINGS
08/01/2000	74	Hearing held on 7/31/00 Re: Confirmation of chapter 13 plan; CONTINUED TO 9/18/00 @11:00 A.M. RE: Item #65 [EOD 08/01/2000] [CR3]
08/01/2000	75	Hearing held on 7/31/00 Re: Objection to claim (1) The United States of America Department of Treasury; Internal Revenue Service; TAKEN UNDER RE: Item #66 [EOD 08/01/2000] [CR3]
09/11/2000	76	Memorandum of decision/The objection to the claim of the United States of America, Department of the Treasury, Internal Revenue Service is sustained. The Court will prepare an order consistent with this memorandum of decision. With certificate of service. RE: Item #53 [EOD 09/11/2000] [ES]

DATE	DOCKET NUMBER	PROCEEDINGS
09/11/2000	77	ORDER granting/approving/ sustaining the Debtors' objection to claim of United States of America, Department of the Treasury, Internal Revenue Service. With certificate of service. RE: Item #53 [EOD 09/11/2000] [ES]
09/18/2000	78	Notice of appeal of the United States of America of Order Sustaining Debtors' Objection to Claim of United States of America, Department of Treasury, Internal Revenue Service. Filed by Ron S. Chun, Special Assistant U.S. Attorney. Fees charged to government, reference no. LA-000825. With proof of service on 9/18/2000. [Disposed] RE: Item # [EOD 09/19/2000] [ES]
09/18/2000	79	Statement of election to transfer appeal to United States District Court and objection of the United States of America to hearing

DATE	DOCKET NUMBER	PROCEEDINGS
		and disposition by the Bankruptcy Appellate Panel of the Ninth Circuit. Filed by Ron S. Chun. RE: Item #78 [EOD 09/19/2000] [ES]
09/19/2000	80	Hearing held on 9/18/00 Re: Confirmation of Chapter 13 Plan; CONFIRMED RE: Item #74 [EOD 09/19/2000] [CR3]
09/20/2000	81	Notice of referral of appeal to U.S. District Court with certificate of mailing. RE: Item #78 [EOD 09/20/2000] [ES]
10/02/2000	82	ORDER on motion to avoid lien and order confirming chapter 13 plan/Plan confirmed on September 18, 2000 with 20 months to pay. RE: Item #26 [EOD 10/02/2000] [ES]
10/02/2000	83	Statement of issues on appeal by appellant filed by Gregory A Roth, Assistant United States Attorney (District Court Case No. EDCV-00-0753-VAP). RE: Item #78 [EOD 10/03/2000] [RMA]

DATE	DOCKET NUMBER	PROCEEDINGS
10/02/2000	84	Designation of record on appeal by appellant filed by Gregory A Roth, Assistant United States Attorney (District Court Case No. EDCV-00-0753-VAP) RE: Item #78 [EOD 10/03/2000] [RMA]
10/02/2000	85	Notice of transcripts for hearing on 5-15-00 and 7-31-00; filed by Gregory A Roth, Assistant United States Attorney. (District Court Case No. EDCV-00-0753-VAP) RE: Item #78 [EOD 10/03/2000] [RMA]
10/02/2000	86	Substitution of attorney and change of address for lead counsel for the United States with respect to its appeal. The lead counsel is now Gregory A. Roth, Esq., U.S. Attorney's Office, Tax Division, Room 7211, Federal Building, 300 North Los Angeles, Street, Los Angeles, CA 90012-3308. (213) 894-2576. (District Court Case

DATE	DOCKET NUMBER	PROCEEDINGS
		No. EDCV-00-0753-VAP). RE: Item #78 [EOD 10/04/2000] [ES]
10/12/2000	87	Statement of issues on appeal by appellant (AMENDMENT), filed by Gregory A. Roth, Assistant United States Attorney. EDCV-00-0753-VAP; with proof of service. RE: Item #78 [EOD 10/13/2000] [RMA]
10/26/2000	88	Certificate of readiness of record on appeal/District Court Case No. EDCV 00-0753 VAP. RE: Item #78 [EOD 10/26/2000] [ES]
11/13/2000	89	Notice of intent to pay claims filed by Chapter 13 Trustee; with proof of service [EOD 11/14/2000] [APR]
12/21/2000	90	Withdrawal re: of proof of claim of American First Federal, Inc., amount of $273,738.52, filed by Hydee J Mulichak, Attorney for American First Federal, Inc., with proof of service [EOD 12/28/2000] [RMA]

DATE	DOCKET NUMBER	PROCEEDINGS
12/27/2000	91	Request for special notice filed by Gregory A Roth of US Attorney's Office Tax Division; with proof of service. [EOD 12/28/2000] [RF]
01/11/2001	92	ORDER allowing and disallowing claim(s) by Stipulation to clarify discharge of secured claims, priority claims and general unscured claims of the United States of America, Department of Treasury, Internal Revenue Service - ALLOWED: IRS Secured claim for $395,006.37, Priority claim for $160.36 and General Unsecured claim for #13.16; With Notice of Entry (Please see Original Order for details) RE: Item #53 [EOD 01/12/2001] [MG]
02/08/2001	93	Stipulation and ORDER thereon re Amended stipulation between the debtor and the United States of America to clarify discharge of secured claims, priority claims, and general unsecured claims

DATE	DOCKET NUMBER	PROCEEDINGS
		of the United States of America, Department of Treasury, Internal Revenue Service; with Notice of Entry [EOD 02/08/2001] [CR3]
02/27/2001	94	Notice of infeasibility of the chapter 13 plan because the plan will not pay out at its present plan payment [EOD 03/01/2001] with proof of service RE: Item #26 [EOD 03/02/2001] [CR3]
03/06/2001	95	Response by Debtor to Trustee's Notice of infeasibility of the Chapter 13 plan, etc.; Declaration of David R. Haberbush; with proof of service RE: Item #94 [EOD 03/07/2001] [CR3]
03/15/2001	96	Errata (notice of) re debtors' response to trustee's notice of infeasibility of the chapter 13 plan, etc. Filed by David R. Haberbush. With proof of service. RE: Item #95 [EOD 03/16/2001][ES]

DATE	DOCKET NUMBER	PROCEEDINGS
03/28/2001	97	BAP/USDC appeal judgment - The appeal is AFFIRMED. USDC CASE NO. EDCV 00-0753-VAP. RE: Item #78 [EOD 03/28/2001] [ES]
03/30/2001	98	Notice of intent to file report of trustee and certification that the estate has been fully administered with proof of service [EOD 04/03/2001] [CR3]
04/26/2001	99	ORDER allowing and disallowing claim(s) (STIPULATION) Allowing claim of the State of California Employment Development Department; with Notice of Entry [EOD 04/27/2001] [CR3]
05/01/2001	100	Declaration Re non receipt of objections to trustee's final report and account and request for dishcharge of debtor; filed by Edwina Dowell, Trustee RE: Item #98 [EOD 05/03/2001] [CR3]

DATE	DOCKET NUMBER	PROCEEDINGS
05/03/2001	101	ORDER discharging debtor after completion of chapter 13 plan - cases filed after 11/5/90 (requested from BNC) RE: Item #100 [EOD 05/03/2001] [CR3]
05/06/2001	102	Certificate of mailing (21 copies) RE: Item #101 [EOD 05/08/2001] [BNC]
06/07/2001	103	ORDER allowing and disallowing claim(s) by stipulation to amend order allowing claim of the State of California Employment Development Department; with notice of entry [EOD 06/07/2001] [LRL]
10/24/2001	104	ORDER discharging chapter 13 panel trustee and exonerate bond liability [EOD 10/24/2001] [CR3]
10/24/2001	104A	Final report of trustee in asset case (Chapter 13) - CASE CONCLUDED [EOD 10/24/2001] [CR3]
12/14/2001	105	ORDER closing case DISMISSED. [EOD 12/14/2001] [ES]

DATE	DOCKET NUMBER	PROCEEDINGS
04/30/2002	106	Memorandum of points and authorities in support of motion for order to show cause re civil contempt for violations of discharge injunction. Filed by David Haberbush, Attorney for Debtors. with proof of service; [EOD 05/01/2002] [WAW]
04/30/2002	107	Declaration of David Haberbush in support of motion for order to show cause re civil contempt for violations of discharge injunction; with proof of service; RE: Item #106 [EOD 05/01/2002] [WAW]
04/30/2002	108	Declaration of Abel C. Galletti in support of motion for order to show cause re; civil contempt for violations of discharge injunction; with proof of service; RE: Item #106 [EOD 05/01/2002] [WAW]

DATE	DOCKET NUMBER	PROCEEDINGS
04/30/2002	109	Request for judicial notice in support of motion for order to show cause re; civil contempt for violations of discharge injunction; Filed by David Haberbush, Attorney for Debtors. with proof of service; RE: Item #106 [EOD 05/01/2002] [WAW]
04/30/2002	110	Motion to reopen case chapter 13 bankruptcy case; memorandum of points and authorities; declaration of Abel C. Galletti; declaration of David R. Haberbush; with proof of service; filed by David R. Haberbush, attorney for debtors hearing on 05/29/2002 at 10:00 a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 [EOD 05/01/2002] [LRL]
04/30/2002	111	Request for judicial notice in support of motion to reopen chapter 13 bankruptcy case; with proof of service RE: Item #110 [EOD 05/01/2002] [LRL]

DATE	DOCKET NUMBER	PROCEEDINGS
05/02/2002	112	ORDER to show cause re: contempt for violations of court orders disallowing claims and granting debtors' discharge with notice of entry hearing on 05/29/2002 at 10:00 a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 [Rescheduled] RE: Item #106 [EOD 05/02/2002] [LRL]
05/03/2002	113	Notice of hearing of motion to reopen chapter 13 bankruptcy case. Filed by David Haberbush, Attorney for Debtors. With proof of service; hearing on 05/29/2002 at 10:00 a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 RE: Item #110 [EOD 05/06/2002] [WAW]
05/06/2002	114	Motion to reopen case with proof of service; filed by David R. Haberbush, attorney for debtor hearing on 05/29/2002 at 10:00 a.m. at

DATE	DOCKET NUMBER	PROCEEDINGS
		255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 [Disposed] RE: Item #110 [EOD 05/07/2002] [LRL]
05/08/2002	115	Declaration of Diane Campbell re: proof of service by mail of: Order to show cause re: contempt for violations of court orders disallowing claims and granting debtor's discharge. RE: Item #112 [EOD 05/09/2002] [WAW]
05/24/2002	116	Notice of rescheduled hearing with certificate of service re: motion to reopen chapter 13 bankruptcy case and order to show cause re: contempt for violations of court orders disallowing claims and granting debtors' discharge hearing on 06/17/2002 at 1:30 p.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 RE: Item #112 [EOD 05/24/2002] [LRL]

DATE	DOCKET NUMBER	PROCEEDINGS
06/13/2002	117	Withdrawal of motion for order to show cause re civil contempt for violations of discharge injunction. Filed by David R. Haberbush. With proof of service. [EOD 06/14/2002] [ES]
06/13/2002	118	Withdrawal of motion to reopen chapter 13 bankruptcy case. Filed by David R. Haberbush. With proof of service. RE: Item #114 [EOD 06/14/2002] [ES]
06/26/2002	119	Hearing held on 6/17/02 Re Motion to re-open case; VACATED; MOTION WITHDRAWN 6/13/02 RE: Item #110 [EOD 06/26/2002] [CR3]
06/26/2002	120	Hearing held on 6/17/02 Re Order to show cause re Contempt; VACATED; WITHDRAWN 6/13/02 RE: Item #112 [EOD 06/26/2002] [CR3]

UNITED STATES BANKRUPTCY COURT FOR
THE CENTRAL DISTRICT OF CALIFORNIA

No. 00-13574

IN RE FRANCESCO BRIGUGLIO AND
ANGELA BRIGUGLIO, DEBTORS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
02/04/2000	1	Voluntary petition under chapter 13 [EOD 02/07/2000] [BSI]
02/04/2000	2	Statement of related cases [EOD 02/07/2000] [BSI]
02/04/2000	3	Notice of available chapters [EOD 02/07/2000] [BSI]
02/04/2000	4	Summary of schedules [EOD 02/07/2000] [BSI]
02/04/2000	5	Schedule A filed [EOD 02/07/2000] [BSI]
02/04/2000	6	Schedule B filed [EOD 02/07/2000][BSI]
02/04/2000	7	Schedule C filed [EOD 02/07/2000] [BSI]
02/04/2000	8	Schedule D filed [EOD 02/07/2000] [BSI]
02/04/2000	9	Schedule E filed [EOD 02/07/2000] [BSI]

DATE	DOCKET NUMBER	PROCEEDINGS
02/04/2000	10	Schedule F filed [EOD 02/07/2000] [BSI]
02/04/2000	11	Schedule G filed [EOD 02/07/2000] [BSI]
02/04/2000	12	Schedule H filed [EOD 02/07/2000][BSI]
02/04/2000	13	Schedule I filed [EOD 02/07/2000] [BSI]
02/04/2000	14	Schedule J filed [EOD 02/07/2000] [BSI]
02/04/2000	15	Declaration concerning debtor's schedules [EOD 02/07/2000] [BSI]
02/04/2000	16	Statement of financial affairs [EOD 02/07/2000] [BSI]
02/04/2000	17	Verification of creditor matrix [EOD 02/07/2000] [BSI]
02/04/2000	18	Matrix (mailing list) [EOD 02/07/2000] [BSI]
02/04/2000	19	Signature(s) page 2 of petition form B1 for attorney [EOD 02/07/2000] [BSI]
02/04/2000	20	Attorney's state bar number on page 1 of petition form [EOD 02/07/2000] [BSI]
02/04/2000	21	Disclosure of attorney fees [EOD 02/07/2000] [BSI]

DATE	DOCKET NUMBER	PROCEEDINGS
02/04/2000	22	ORDER to comply with bankruptcy rule 1007 and notice of intent CH13 Plan-Motn Avoid Lien AMENDED [EOD 02/07/2000] [BSI]
02/04/2000	23	Certificate of mailing (3 copies) RE: Item #22 [EOD 02/07/2000] [BSI]
02/08/2000	24	Notice of 341a meeting (requested from BNC) hearing on 03/08/2000 at 10:30 a.m. at 221 N. Figueroa St., Ste. 102, Los Angeles, CA 90012 [EOD 02/08/2000] [LBI]
02/08/2000	24A	Notice of confirmation hearing hearing on 05/15/2000 at 10:00 a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 RE: Item #24 [EOD 02/08/2000] [LBI]
02/11/2000	25	Certificate of mailing [EOD 02/14/2000] [BNC] with proof of service (15 copies) RE: Item #24 [EOD 03/16/2001] [CAC]

DATE	DOCKET NUMBER	PROCEEDINGS
02/18/2000	26	Request for judicial notice (by Debtor) in support of Chapter 13 plan and motion to avoid liens. Filed by David R. Haberbush. [EOD 02/22/2000] [ES]
02/18/2000	27	Debtor's notice of section 341(a) meeting and hearing on confirmation of chapter 13 plan with copy of chapter 13 plan with proof of service [EOD 02/23/2000] [KSC]
02/18/2000	27A	Chapter 13 plan RE: Item #27 [EOD 02/23/2000] [KSC]
02/18/2000	28	Chapter 13 plan and motion to avoid liens RE: Item #22 [EOD 02/23/2000] [EW2]
04/24/2000	29	Motion and notice of motion to (1) Value the secured interest, pursuant to 11 U.S.C. 506(a0 and Federal Bankruptcy Rule of Procedure 3012, of: (a) American First Federal, Inc., (b) Sysco Food Services of Los Angeles, Inc., and (c) State of California Franchis[e] Tax Board and (2) To avoid liens pursuant to 11 U.S.C.

DATE	DOCKET NUMBER	PROCEEDINGS
		522(f) memorandum of points and authorities; declaration of Francesco Briguglio hearing on 05/15/2000 at 10:00 a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 [Disposed] [EOD 04/25/2000] [CYK]
04/24/2000	30	Request for judicial notice RE: Item #29 [EOD 04/25/2000] [CYK]
04/24/2000	31	Amendment to schedule(s) "C", with proof of service RE: Item #7 [EOD 04/25/2000] [OD]
05/01/2000	32	Opposition (LIMITED) to Debtors' motion to (1) Value Secured interests and (2) Avoid Liens, filed by Jennifer Witherell Crastz, Stephen E. Jenkins Attorney for Sysco Food Services of Los Angeles, Inc. With proof of service. RE: Item #29 [EOD 05/02/2000] [RMA]
05/01/2000	33	Request for judicial notice in support of limited opposition to Debtors' motion to (1) Value secured interests and

DATE	DOCKET NUMBER	PROCEEDINGS
		(2) Avoid liens, filed by Jennifer Witherell Crastz, with proof of service. [EOD 05/02/2000] [RMA]
05/04/2000	34	Objection/Trustee's objection to Plan Confirmation and declaration in support, filed by Edwina E. Dowell, Trustee Chapter 13 Standing Trustee. With proof of service. RE: Item #24A [EOD 05/05/2000] [RMA]
05/04/2000	35	Objection to claim and notice of motion/objection objection to claim of United States of America Department of Treasury, Internal Revenue Service, memorandum of points and authorities; declaration of David R. Haberbush, Esquire (562) 435-3456 hearing on 06/19/2000 at 11:00 a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 [Disposed] [EOD 05/05/2000] [CYK]

DATE	DOCKET NUMBER	PROCEEDINGS
05/09/2000	36	Reply of Debtors to limited opposition to Debtor's motion to (1) value secured interests; and (2) avoid liens. Filed by David R. Haberbush, attorney for Debtors. With proof of service. RE: Item #32 [EOD 05/10/2000][ES]
05/09/2000	37	Objection to Debtors' motion to confirm Chapter 13 Plan. Filed by Jennifer Witherell Crastz, attorney for Sysco Food Services of Los Angeles, Inc. With proof of service. RE: Item #28 [EOD 05/10/2000] [ES]
05/09/2000	38	Request for judicial notice in support of objection to confirmation of Chapter 13 Plan. Filed by Jennifer Witherell Crastz. HEARING: MAY 15, 2000 AT 10:00 AM. RE: Item #37 [EOD 05/10/2000] [ES]
05/09/2000	39	Reply of Debtor to Trustee's objection to plan confirmation. Filed by David R. Haberbush, attorney for Debtors. RE: Item #34 [EOD 05/10/2000] [ES]

DATE	DOCKET NUMBER	PROCEEDINGS
05/11/2000	40	Reply To Sysco's objection to Plan confirmation, filed by David R. Haberbush, Attorney for Debtors. With proof of service. RE: Item #37 [EOD 05/12/2000] [RMA]
05/16/2000	41	Hearing held on 5/15/00 Re: Confirmation of Chapter 13 Plan-CONTINUED TO 6/19/00 @11:00 A.M. RE: Item #24A [EOD 05/16/2000] [CR3]
05/16/2000	42	Hearing held on 5/15/00 Re: Motion and Notice of Motion; GRANTED RE: Item #29 [EOD 05/16/2000] [CR3]
06/01/2000	43	ORDER granting/approving motion to: (1) Value secured interests pursuant to 11 U.S.C. 506(a) and Federal Bankruptcy Rule of Procedure 3012, of: (a) American First Federal, Inc.; (b) Sysco Food Services of Los Angeles, Inc.; and (c) State of California Franchise Tax Board, and (2) To avoid liens pursuant to 11 U.S.C.522(f). See Order for terms. With notice of entry. RE: Item #29 [EOD 06/02/2000] [ES]

DATE	DOCKET NUMBER	PROCEEDINGS
06/05/2000	44	Declaration of Diane Compbell re proof of service by U. S. Mail of: Notice of Motion/ Objection and Motion/ Objection to claim of United States of America, Department of the Treasury, Internal Revenue Service. [EOD 06/08/2000] [RMA]
06/13/2000	45	Opposition/United States' opposition to Motion/ Objection to claim of United States of America, Department of Treasury, Internal Revenue Service, filed by Ron S. Chun, Special Assistant United States Attorney. Attorney for United States of America. With certificate of service by mail. RE: Item #35 [EOD 06/14/2000] [RMA]
06/21/2000	46	Hearing held on 6/19/00 Re: Confirmation of Chapter 13 plan; CONTINUED TO 7/31/00 @11:00 A.M. RE: Item #41 [EOD 06/21/2000] [CR3]

DATE	DOCKET NUMBER	PROCEEDINGS
06/21/2000	47	Hearing held on 6/19/00 Re: Objection to claim; CONTINUED TO 7/31/00 @11:00 A.M. RE: Item #35 [EOD 06/21/2000] [CR3]
06/28/2000	48	ORDER re: Scheduling Order re briefing and hearing on Debtors' motion/objection to claim of The United States of America Department of The Treasury, Internal Revenue Service. Hearing continued to July 31, 2000 at 11:00 a.m. See order for further details. With Notice of Entry. RE: Item #35 [EOD 06/29/2000] [RMA]
07/03/2000	49	Memorandum of points and authorities (SUPPLEMENTAL) in support of motion/ objection to claim of United States of America, Department of the Treasury, Internal Revenue Service, filed by David R. Haberbush, Robert C. Hastie, Attorneys for Debtors. With proof of service. [EOD 07/05/2000] [RMA]

DATE	DOCKET NUMBER	PROCEEDINGS
07/12/2000	50	Chapter 13 plan and motion to avoid liens; With proof of service (FIRST AMENDED) RE: Item #28 [EOD 07/13/2000] [DEO]
07/17/2000	51	Original signature page of Debtors and Debtors' attorney in support of First Amended Chapter 13 Plan and Motion to avoid liens, filed by David R. Haberbush, Attorneys for Debtors, Francesco Briguglio and Angela Briguglio. With proof of service. RE: Item #50 [EOD 07/18/2000] [RMA]
07/21/2000	52	Supplemental memorandum of points and authorities in support to opposition to Motion/Objection to claim of United States of America, Department of Treasury, Internal Revenue Service, filed by Ron S. Chun, Special Assistant United States Attorney. With proof of service. RE: Item #49 [EOD 07/24/2000] [RMA]

DATE	DOCKET NUMBER	PROCEEDINGS
07/28/2000	53	Reply to United States' supplemental memorandum of points and authorities in opposition to objection to claim of Internal Revenue Service, filed by Robert C Hastie, Attorney for Debtors and Plaintiffs. With proof of service. RE: Item #52 [EOD 07/31/2000] [RMA]
08/01/2000	54	Hearing held on 7/31/00 Re: Confirmation of chapter 13 plan; CONTINUED TO 9/18/00 @11:00 RE: Item #46 [EOD 08/01/2000] [CR3]
08/01/2000	55	Hearing held on 7/31/00 Re: Objection to claim; TAKEN UNDER SUBMISSION RE: Item #47 [EOD 08/01/2000] [CR3]
08/07/2000	56	Motion /objection and notice of motion/objection to claim Filed by, California State Board of Equalization; memorandum of points and authorities; declaration of David R. Haberbush, Filed by: David R. Haberbush hearing on 09/18/2000 at 11:00 a.m. at 255

DATE	DOCKET NUMBER	PROCEEDINGS
		E. Temple St., Courtroom 1568, Los Angeles, CA 90012 [Disposed] [EOD 08/08/2000] [CYK]
08/10/2000	57	Stipulation and ORDER thereon voiding lien of Sysco Food Services of Los Angeles, Inc.; With notice of entry [EOD 08/11/2000] [DEO]
08/31/2000	58	Stipulation and ORDER thereon voiding lien of First American Federal, Inc. With Notice of Entry. [EOD 09/01/2000] [RMA]
09/11/2000	59	Memorandum of decision re: Objection to claim of United States of America, Department of the Treasury, Internal Revenue Service. The claim objection is sustained in part. The Court will prepare an order consistent with this memorandum of decision. With certificate of service. RE: Item #35 [EOD 09/12/2000] [ES]

DATE	DOCKET NUMBER	PROCEEDINGS
09/11/2000	60	ORDER granting/approving in part. IT IS ORDERED that the Debtors' objection to claim of United States of America, Department of the Treasury, Internal Revenue Service is SUSTAINED in the amount of $403,428.22 and OVERRULED in the amount of $23,974.52. With certificate of service. RE: Item #35 [EOD 09/12/2000] [ES]
09/19/2000	61	Hearing held on 9/18/00 Re: Confirmation of Chapter 13 Plan; CONTINUED TO 11/13/00 @11:00 A.M. RE: Item #54 [EOD 09/19/2000] [CR3]
09/19/2000	62	Hearing held on 9/18/00 Re: Objection to claim; GRANTED RE: Item #56 [EOD 09/19/2000] [CR3]
09/18/2000	63	Notice of appeal filed by Ron S Chun Special Assitant United States Attorney for the Appelant United States of America. Fees charged to government, Reference #LA-000824. [Disposed] RE: Item #60 [EOD 09/19/2000] [RMA]

DATE	DOCKET NUMBER	PROCEEDINGS
09/18/2000	64	Statement of election to transfer appeal to District Court. Filed by Ron S Chun, Special Assis[t]ant United States Attorney for the Appellant. RE: Item #63 [EOD 09/19/2000] [RMA]
09/20/2000	65	Notice of referral of appeal to U.S. District Court with certificate of mailing RE: Item #63 [EOD 09/20/2000] [RMA]
10/02/2000	66	Statement of issues on appeal by appellant filed by Gregory A Roth, Assistant United States Attorney. (District Court Case No. CV-00-10345-CM) RE: Item #63 [EOD 10/03/2000] [RMA]
10/02/2000	67	Designation of record on appeal by appellant filed by Gregory A Roth, Assistant United States Attorney. (District Court Case No. CV-00-10345-CM) RE: Item #63 [EOD 10/03/2000] [RMA]
10/02/2000	68	Notice of transcripts for hearings on 6-19-00 and 7-31-00; filed by Gregory A Roth (District Court Case No. CV-00-10345-CM) RE: Item #63 [EOD 10/03/2000] [RMA]

DATE	DOCKET NUMBER	PROCEEDINGS
09/26/2000	69	Document: Notice regarding appeal from bankrupcty court, filed by Estrella L Tamayo from U. S. District Court. (CV-00-10345-CM) RE: Item #63 [EOD 10/04/2000] [RMA]
10/02/2000	70	Substitution of attorney and change of address for Lead Counsel for appeal CV-00-10345-CM: Gregory A Roth, Esq., U. S. Attorney's Office, Tax Division Room 7211, Federal Building 300 North Los Angeles Street Los Angeles, CA 90012-3308, Telephone (213) 894-2576 and Facsimile (213) 894-0115, filed by Gregory A Roth, Assistant United States Attorney; With proof of service. RE: Item #63 [EOD 10/04/2000] [RMA]
10/06/2000	71	ORDER disallowing claim(s) filed by California State Board of Equalization. With Notice of Entry. RE: Item #56 [EOD 10/10/2000] [RMA]

DATE	DOCKET NUMBER	PROCEEDINGS
10/12/2000	72	Statement of issues on appeal by appellant (AMENDMENT), filed by Gregory A Roth, Assistant United States Attorney. CV-00-10345-CM; with proof of service. RE: Item #63 [EOD 10/13/2000] [RMA]
10/26/2000	73	Certificate of readiness of record on appeal (CV-00-10345-CM), with certificate of mailing. RE: Item #63 [EOD 10/26/2000] [RMA]
11/01/2000	74	ORDER re: Transfer of appeal at USCD; Previous Case # CV00-10345CM, New Case # EDCV 00-842 VAP. And RE: Item #63 [EOD 11/01/2000] [RMA]
11/01/2000	75	Notice re Intra-District transfer by Clerk of Court. EDCV 00-842 VAP. R E: Item #74 [EOD 11/01/2000] [RMA]
11/14/2000	76	Hearing held on 11/13/00 Re Confirmation Hearing re Chapter 13 Plan; CONTINUED TO 1/22/01 @11:00 A.M. RE: Item #61 [EOD 11/14/2000] [CR3]

DATE	DOCKET NUMBER	PROCEEDINGS
11/13/2000	77	Notice re: Bankruptcy record complete, briefing schedule and notice of entry, filed by L Adams, Deputy Clerk, U. S. Distric Court - ED CV 00-842 VAP RE: Item #65 [EOD 11/17/2000] [RMA]
12/11/2000	78	Amendment to schedule(s) with proof of service RE: Item #4 [EOD 12/12/2000] [EW2]
12/11/2000	78A	Schedule C filed RE: Item #7 [EOD 12/12/2000] [EW2]
12/27/2000	79	Request for special notice filed by Gregory A. Roth, attorney for the United States of America, the Department of the Treasury, the Internal Revenue Services, and creditor/party-in-interest United States of America, Dept of the Treasury, Internal Revenue Service [EOD 12/28/2000] [LMP]
01/05/2001	80	Chapter 13 plan and motion to avoid liens (second amended) with proof of service RE: Item #28 [EOD 01/08/2001] [CAC]

DATE	DOCKET NUMBER	PROCEEDINGS
01/16/2001	81	Objection of the United States to confirmation of Debtors' Chapter 13 Plan; and memorandum of points and authorities; declaration of Ron Chun; declaration of Gregory A. Roth. Filed by Gregory A. Roth, Assistant United States Attorney. With proof of service. RE: Item #80 [EOD 01/17/2001] [ES]
01/18/2001	82	ORDER granting/approving stipulation between the Debtors and the United States of America to clarify discharge of secured claims, priority unsecured claims, and general unsecured claims of the United States of America, Department of Treasury, Internal Revenue Service. With notice of entry. SEE ORDER FOR TERMS. [EOD 01/19/2001] [ES]
01/22/2001	83	Hearing held re Confirmation of Chapter 13 Plan. CONTINUED TO 3/19/01 AT 11:00 A.M. RE: Item #76 [EOD 01/24/2001] [ES]

DATE	DOCKET NUMBER	PROCEEDINGS
03/14/2001	84	Amendment to schedule(s) with proof of service RE: Item #4 [EOD 03/16/2001] [CAC]
03/14/2001	84A	Schedule C filed RE: Item #7 [EOD 03/16/2001] [CAC]
03/14/2001	85	Chapter 13 plan and motion to avoid liens (Third Amended) RE: Item #27A [EOD 03/16/2001] [CAC]
03/19/2001	86	Hearing held re: Confirmation of chapter 13 plan. CONTINUED TO 4/16/01 AT 11:00 A.M. RE: Item #85 [EOD 03/20/2001] [ES]
03/28/2001	87	BAP/USDC appeal judgment - The appeal is AFFIRMED. USDC NO. EDCV 00-00842-VAP. RE: Item #63 [EOD 03/28/2001] [ES]
04/16/2001	88	Hearing held re: Confirmation of chapter 13 plan. CONTINUED TO 5/21/01 AT 11:00 A.M. RE: Item #85 [EOD 04/17/2001] [ES]
04/26/2001	89	ORDER granting/approving (by stipulation), withdrawal of claim filed by the State of

DATE	DOCKET NUMBER	PROCEEDINGS
		California Employment Development Department. With notice of entry. [EOD 04/27/2001] [ES]
05/21/2001	90	Hearing held re: Confirmation of chapter 13 plan. CONTINUED TO 6/18/01 AT 11:00 A.M. RE: Item #85 [EOD 05/24/2001] [ES]
06/01/2001	91	Chapter 13 plan FOURTH AMENDED and motion to avoid liens. With proof of service. RE: Item #85 [EOD 06/04/2001] [ES]
06/14/2001	92	Chapter 13 plan with proof of service RE: Item #28 [EOD 06/15/2001] [CAC]
06/18/2001	93	Hearing held re: Confirmation of chapter 13 plan. CONFIRMED. RE: Item #92 [EOD 06/19/2001] [ES]
06/22/2001	94	ORDER on motion to avoid lien and order confirming chapter 13 plan / Plan confirmed on 6/18/01 for 11 months. RE: Item #92 [EOD 06/22/2001] [ES]

DATE	DOCKET NUMBER	PROCEEDINGS
08/08/2001	95	Notice of intent to pay claims filed by Edwina E. Dowell, trustee with proof of service. [EOD 08/09/2001] [CC]
09/28/2001	96	Notice of intent to file report of trustee and certification that the estate has been fully administered [EOD 10/02/2001] [ES]
11/13/2001	97	Declaration re Non-receipt of objections to trustee's final report and account and request for discharge of debtor(s). RE: Item #96 [EOD 11/16/2001] [ES]
11/16/2001	98	ORDER discharging debtor after completion of chapter 13 plan - cases filed after 11/5/90 (requested from BNC) [EOD 11/16/2001] [ES]
11/21/2001	99	Certificate of mailing (17 copies) RE: Item #98 [EOD 11/26/2001] [BNC]
11/29/2001	100	ORDER discharging chapter 13 panel trustee and exonerate bond liability [E O D 11/29/2001] [ES]

DATE	DOCKET NUMBER	PROCEEDINGS
11/29/2001	100A	Final report of trustee in asset case (Chapter 13) - CASE CONCLUDED RE: Item #98 [EOD 11/29/2001] [ES]
12/14/2001	101	ORDER closing case DISCHARGED. [EOD 12/14/2001] [ES]
04/30/2002	102	Motion to reopen case chapter 13 bankruptcy case; memorandum of points and authorities; declaration of Francesco Briguglio; declaration of David R. Haberbush, with proof of service; filed by David R. Haberbush, attorney for debtor hearing on 05/29/2002 at 10:00 a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 [EOD 05/01/2002] [LRL]
04/30/2002	103	Memorandum of points and authorities in support of motion for order to show cause re civil contempt for violations of discharge injunction. Filed by David R. Haberbush, attorney for debtors. With proof of service. RE: Item #102 [EOD 05/01/2002] [ES]

DATE	DOCKET NUMBER	PROCEEDINGS
04/30/2002	104	Declaration of David R. Haberbush in support of motion for order to show cause re civil contempt for violations of discharge injunction. With proof of service. RE: Item #102 [EOD 05/01/2002] [ES]
04/30/2002	105	Declaration of Francesco Briguglio in support of motion for order to show cause re contempt for violations of discharge injunction. With proof of service. RE: Item #102 [EOD 05/01/2002] [ES]
04/30/2002	106	Request for judicial notice in support of motion for order to show cause re contempt for violations of discharge injunction. With proof of service. RE: Item #102 [EOD 05/01/2002] [ES]
04/30/2002	107	Request for judicial notice in support of motion to reopen chapter 13 bankruptcy case; with proof of service RE: Item #102 [EOD 05/01/2002] [LRL]

DATE	DOCKET NUMBER	PROCEEDINGS
05/02/2002	108	ORDER to show cause re: contempt for violations of court orders disallowing claims and granting debtors' discharge with notice of entry hearing on 05/29/2002 at 10:00 a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 [Disposed] RE: Item #103 [EOD 05/02/2002] [LRL]
05/03/2002	109	Notice of motion/application to reopen chapter 13 bankruptcy case. With proof of service. RE: Item #102 [EOD 05/06/2002] [ES]
05/06/2002	110	Motion to reopen case chapter 13 bankrupty case with proof of service; filed by David R. Haberbush, attorney for debtor hearing on 05/29/2002 at 10:00 a.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 [Disposed] RE: Item #109 [EOD 05/07/2002] [LRL]
05/08/2002	111	Declaration of Diane Campbell re proof of service by mail re: order to show cause

DATE	DOCKET NUMBER	PROCEEDINGS
		re contempt for violations of court orders disallowing claims and granting debtors' discharge. RE: Item #108 [EOD 05/09/2002] [ES]
05/24/2002	112	Notice of rescheduled hearing with certificate of service re: motion to reopen chapter 13 bankruptcy case and order to show cause re: contempt for violations of court orders disallowing claims and granting debtors' discharge hearing on 06/17/2002 at 1:30 p.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 RE: Item #108 [EOD 05/24/2002] [LRL]
06/13/2002	113	Application and ORDER rescheduling hearing - GRANTED re: Stipulation to continue hearing on order to show cause re civil contempt for violations of discharge instructions. With notice of entry. hearing on 07/22/2002 at 1:30 p.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 RE: Item #108 [EOD 06/14/2002] [ES]

DATE	DOCKET NUMBER	PROCEEDINGS
06/13/2002	114	Application and ORDER rescheduling hearing - GRANTED re: Motion to reopen chapter 13 bankruptcy case. With notice of entry. hearing on 07/22/2002 at 1:30 p.m. at 255 E. Temple St., Courtroom 1568, Los Angeles, CA 90012 RE: Item #110 [EOD 06/14/2002] [ES]
06/26/2002	115	Hearing held on 6/17/02 Re Motion to reopen case chapter 13; VACATED; CONTINUED TO 7/22/02 @1:30 P.M. RE: Item #102 [EOD 06/26/2002] [CR3]
06/26/2002	116	Hearing held on 6/17/02 Re Order to show cause; VACATED-CONTINUED TO 7/22/02 @1:30 P.M. RE: Item #108 [EOD 06/26/2002] [CR3]
07/16/2002	117	Withdrawal of motion for order to show cause re civil contempt for violations of discharge injunction with proof of service RE: Item #108 [EOD 07/17/2002] [LRL]

DATE	DOCKET NUMBER	PROCEEDINGS
07/16/2002	118	Withdrawal of motion to reopen chapter 13 bankruptcy case with proof of service RE: Item #110 [EOD 07/17/2002] [LRL]
08/05/2002	119	Hearing held on 7/22/02 Re Motion to reopen; VACATED-WITHDRAWN 7/16/02 RE: Item #102 [EOD 08/05/2002] [CR3]
08/05/2002	120	Hearing held on 7/22/02 Re Order to show cause re Contempt; VACATED-WITHDRAWN 7/16/02 RE: Item #108 [EOD 08/05/2002] [CR3]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(EASTERN DIVISION)

No. 00-CV-753

UNITED STATES OF AMERICA, APPELLANT

v.

ABEL COSMO GALLETTI AND SARAH GALLETTI, APPELLEES

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
9/22/00	2	NOTICE RE: APPEAL FROM BKCY COURT; Bkcy #: LA 99-48587 ER; Advsry#: N/A; BAP#: N/A assigned to Judge Virginia A. Phillips for all further proceedings. (cc: Bkcy Judge, Clerk-Bkcy Crt, Clerk-Bkcy App Crt, Dist Crt Judge, all parties) (am) [Entry date 09/26/00] [Edit date 09/26/00]
9/22/00	1	NOTICE OF FILING BANKRUPTCY APPEAL RE: ORD sustaing debtors obj to clm of USA Dept of Treasury IRS

DATE	DOCKET NUMBER	PROCEEDINGS
		Bkcy#: LA 99-48587 ER Advsy#: N/A Bkcy Judge E Robles ordered entered 9/11/00 (cc: all counsel) (am) [Entry date 09/26/00] [Edit date 09/26/00]
9/22/00	3	NOTICE of referral of appeal frm USBC (am) [Entry date 09/26/00]
9/22/00	4	OBJECTIONS filed by appellant USA to hrg & disposition by the BAP of the 9th Cir & stmt of eleciton to transf appeal to USDC (am) [Entry date 09/26/00]
9/27/00	5	STANDING ORDER by Judge Virginia A. Phillips (am) [Entry date 09/27/00]
10/4/00	6	NOTICE of filing of ord & memo of decision bein appealed frm & US ntc of appeal by appellant USA (am) [Entry date 10/12/00]
10/17/00	7	NOTICE of tra[n]scripts (am) [Entry date 10/19/00]

DATE	DOCKET NUMBER	PROCEEDINGS
10/17/00	8	NOTICE OF CHANGE Of Address filed by atty Edward M Robbins Jr for appellant USA (am) [Entry date 10/19/00]
10/17/00	9	NOTICE of designation of record on appeal by appellant USA (am) [Entry date 10/19/00]
10/17/00	10	STATEMENT of issues to be presented on appeal by appellant USA (am) [Entry date 10/19/00]
11/8/00	13	AMENDMENT by appellant USA to stmt of issues to be presented on appeal [10-1] (am) [Entry date 11/13/00]
11/8/00	14	AMENDMENT by appellant USA to stmt of issues to be presented on appeal [10-1] (am) [Entry date 11/13/00]
11/9/00	11	CERTIFICATE OF READINESS AND COMPLETION OF RECORD with copy of docket received from Bkcy Court. Transcripts requested & fld; appellant's brief ddl set on

DATE	DOCKET NUMBER	PROCEEDINGS
		11/24/00; appellee's brief ddl set on 12/10/00; appellant's reply brief ddl set on 12/21/00. (mrgo) [Entry date 11/09/00]
11/9/00	12	NOTICE RE: BANKRUPTCY APPEAL BRIEFING SCHEDULE issued. Cert of readiness docketed 11/9/00 Applnts opning brief to be filed and srvd by 11/24/00. Applee brief must be fld and srvd no later than 15 days aftr applnts opening brief. If applee fld crs-appeal the brief shall incl issues and arguments pertinent to the crs-appeal. Applnt rply brief must be fld and srvd not later than 10 days aftr srvc of applees brief. If applee has crs-appealed, she/he may file and srv a rply brief to the response of the applnt to issues presented in crs-appeal w/in 10 days aftr srvc of applnts rply brief. (cc: Bkcy Judge, Clerk-Bkcy Crt, Clerk-Bkcy App Crt, Dist Crt Judge, all parties) (mrgo) [Entry date 11/09/00]

DATE	DOCKET NUMBER	PROCEEDINGS
11/16/00	15	NOTICE of current address/ telephone no/fac no. & lead cnsl by appellant USA (am) [Entry date 11/21/00]
11/16/00	16	NOTICE of filing of standing ord by appellant USA (am) [Entry date 11/21/00]
11/21/00	17	EXCERPT OF RECORD filed by appellant USA. (la) [Entry date 11/29/00]
11/21/00	18	STIPULATION and ORDER for ext of ti to fi appellant's opening br to 12/1/00 apprvd by Judge Virginia A. Phillips (mrgo) [Entry date 12/06/00]
11/24/00	19	APPELLANT's Opening Brief by appellant USA ; appellant's brief ddl satisfied (mrgo) [Entry date 12/06/00]
12/12/00	20	STIPULATION and ORDER by Judge Virginia A. Phillips for ext of ti to fi appellee's br to 12/20/00 (mrgo) [Entry date 12/14/00]

DATE	DOCKET NUMBER	PROCEEDINGS
12/21/00	21	MINUTES: Cnsl are hereby ntfd tht effec 1/16/01 the Hon Virginia A Phillips US Dist Judge of the Eastern Div of the USDC will be loc @ the addr listed. All sched hrgs will be hld @ said location.by Judge Virginia A. Phillips CR: Maria Beesley (am) [Entry date 12/26/00]
12/21/00	22	APPELLEE's brief by appellee Abel Cosmo Galetti, appellee Sarah Galletti; appellee's brief ddl satisfied (am) [Entry date 12/26/00]
12/21/00	23	APPELLEE's brief by appellee Abel Cosmo Galetti, appellee Sarah Galletti (mrgo) [Entry date 12/27/00]
1/2/01	24	APPELLANT's reply Brief by appellant USA (mrgo) [Entry date 01/04/01]
3/23/01	25	MEMO OPINION & ORDER by Judge Virginia A. Phillips that the bankruptcy courts ruling sustaining the clm obj is AFFIRMED. terminating case (MD JS-6) (ENT 3/26/01) (am) [Entry date 03/26/01]

DATE	DOCKET NUMBER	PROCEEDINGS
3/23/01	—	PLACED IN FILE - NOT USED-stip & ord for ext of time to fiel appellee's brief lodged 12/8/00 (mrgo) [Entry date 03/30/01]
5/21/01	26	NOTICE OF APPEAL by appellant USA to 9th C/A from Dist. Court ord ent 3/26/01 [25-2] (cc: John S. Gordon, Edward M. Robbins, Gregory A. Roth, AUSA: Haberbush & Campbell; Office of the U.S. Trustee;Edwina E. Dowell, Chapter 13 Trustee; Jerome H. Fridkin, Ron S. Chun; Walter Ryan) Fee: Waived (ghap) [Entry date 05/21/01]
5/21/01	27	TRANSCRIPT DESIGNATION and ordering form for dates: None Requested. (ghap) [Entry date 05/21/01]
6/1/01	28	CERTIFICATE of Record Transmitted to USCA (cc: all parties) (ghap) [Entry date 06/01/01]
6/4/01	29	NOTICE OF No Need by Applnt For Transcript For Appeal re appeal [26-1] (pjap) [Entry date 06/04/01]

DATE	DOCKET NUMBER	PROCEEDINGS
6/26/01	30	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [26-1] 01-55953 (weap) [Entry date 06/26/01]
6/26/01	31	NOTICE RE Transcript Designation & Orderin[g] form; Declaration of Gregory A. Roth [26-1] (weap) [Entry date 06/26/01]
8/28/01	32	ORDER FROM USCA: Crt has determ apps will not be selected for inclusion in the Mediation Program. All fur inquiries re these apps incl req for ext of time, should be directed to Clk's office. Apps are consol. Brief sched set as fol: Applnt shall fl opening brief on or bef 09/21/01; aplles shall fl ans on or bef 07/11/01; applnt may fl an optional reply brief on or bef 11/21/01. A fur ext for fl either of these briefs shall require a showing of extraordinary & compelling circumstances. 9th CCA R. 31-2.2(a). (01-55953) (cbr) [Entry date 09/04/01]

DATE	DOCKET NUMBER	PROCEEDINGS
4/4/02	33	CLERK'S record on appeal transmitted to Circuit [26-1] vols: 1 & 1 brown folder # 17. 01-55953 (ghap) [Entry date 04/04/02]
10/7/02	34	ORDER FROM USCA: Aplles are directed to file resp to Applnt's petn for rehearing & petn for rehearing en banc fld 09/23/02. Resp shall not exceed 15 pages & shall be fld within 21 days of filing date of ord. Aplles will provide this crt w/ 50 cpy(s). (01-55953) (wdc) [Entry date 10/09/02]
12/5/02	—	LODGED CC 9th CCA JUDGMENT of the said District Court affirmed. (FWD TO CRD) (01-55953) (ghap) [Entry date 12/20/02]
12/9/02	35	MINUTES: IN CHAMBERS Filing & Spreading Mandate of the 9th CCA; THE COURT ORDERS that the mandate of the 9th Circuit of Appeals: Affirming is hereby filed & spread upon the mins of this USDC by Judge Virginia A. Phillips; CR: None (ad) [Entry date 12/11/02]

DATE	DOCKET NUMBER	PROCEEDINGS
12/9/02	36	CERTIFIED COPY of judgment from USCA affirming the decision of the District Court [26-1] (cc: all counsel) (ad) [Entry date 12/11/02]
12/19/02	37	RECORD on appeal returned from U.S. Court of Appeals vols: 1; brown folders: 1, doc# 17. (cbr) [Entry date 02/11/03]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(EASTERN DIVISION)

No. 00-CV-842

UNITED STATES OF AMERICA, APPELLANT

v.

FRANCESCO BRIGUGLIO
AND ANGELA BRIGUGLIO, APPELLEES

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
9/26/00	1	NOTICE RE: APPEAL FROM BKCY COURT; Bkcy #: LA 00-13574-ER; Advsry#: N/A ; BAP#: N/A assigned to Judge Carlos R. Moreno for all further proceedings. (cc: Bkcy Judge, Clerk-Bkcy Crt, Clerk-Bkcy App Crt, Dist Crt Judge, all parties) (pc) [Entry date 09/29/00]
9/26/00	3	NOTICE OF APPEAL by appellant USA on behalf of its agency, the Internal Revenue Service, from Ord sustaining debtors' obj to claim of USA, Department of Treasury, IRS ent 9/12/00 (DOA 9/18/00). (gk) [Entry date 10/12/00]

DATE	DOCKET NUMBER	PROCEEDINGS
9/26/00	4	OBJECTION filed by appellant USA to hrg & disposition by the BAP of the 9th Circuit & stmt of election to transfer appeal to US District Court. (gk) [Entry date 10/12/00]
9/26/00	5	BANKRUPTCY COURT'S NOTICE of referral of appeal & certificate of mailing. (gk) [Entry date 10/12/00]
9/26/00	—	BANKRUPTCY COURT'S TRANSMITTAL FORM. (gk) [Entry date 10/12/00]
10/4/00	2	NOTICE of filing of "Order" and "Memo of Decision" being appealed from, and US" Notice of Appeal by appellant USA (pbap) [Entry date 10/06/00]
10/4/00	11	NOTICE by debtor of related case(s) EDCV 00-753 VAP (kc) [Entry date 10/24/00]
10/6/00	6	STANDING ORDER by Judge Carlos R. Moreno re control of case and differations in some respects frm the L/R. (see doc for fur details) (ab) [Entry date 10/13/00]

DATE	DOCKET NUMBER	PROCEEDINGS
10/12/00	7	United S[t]ates' designation of Record on Appeal. (pbap) [Entry date 10/17/00]
10/12/00	8	Stmt of issues to be presented on Appeal by appellant USA (pbap) [Entry date 10/17/00]
10/12/00	9	NOTICE of Transcript(s) (pbap) [Entry date 10/17/00]
10/12/00	10	NOTICE OF CHANGE Of Address & lead cnsl etc filed by atty Gregory A Roth for appellant USA (pbap) [Entry date 10/17/00]
10/31/00	12	ORDER RE TRANSFER PURSUANT TO GENERAL ORDER 224 (Related Case) filed. [Related Case no.: EDCV 00-753 VAP] transferring case to the Eastern Division. Case reassigned from Judge Carlos R. Moreno to Judge Virginia A. Phillips for all further proceedings. The case number will now reflect the initials of the transferee Judge [EDCV 00-842 VAP] (cc: all counsel) (rn) [Entry date 10/31/00]

DATE	DOCKET NUMBER	PROCEEDINGS
10/31/00	13	NOTICE RE INTRA-DISTRICT TRANSFER filed. Case reassigned to Eastern Division by order filed 10/31/00. New case no. EDCV 00-842 VAP assigned to Judge Virginia A. Phillips for all further proceedings. (Original file transferred.) (cc: all counsel) (rn) [Entry date 10/31/00]
10/31/00	14	STANDING ORDER by Judge Virginia A. Phillips (am) [Entry date 11/03/00]
11/9/00	15	CERTIFICATE OF READINESS AND COMPLETION OF RECORD with copy of docket received from Bkcy Court. Transcripts requested and fld.; appellant's brief ddl set on 11/24/00; appellee's brief ddl set on 12/10/00; appellant's reply brief ddl set on 12/21/00. (la) [Entry date 11/09/00]
11/9/00	16	NOTICE RE: BANKRUPTCY APPEAL BRIEFING SCHEDULE issued. Cert of readiness docketed 11/9/00 Applnts opening brief to be filed and srvd by 11-24-00. Applee brief

DATE	DOCKET NUMBER	PROCEEDINGS
		must be fld and srvd no later than 15 days aftr applnts opening brief. If applee fld crs-appeal the brief shall incl issues and arguments pertinent to the crs-appeal. Applnt rply brief must be fld and srvd not later than 10 days aftr srvc of applees brief. If applee has crs-appealed, she/he may file and srv a rply brief to the response of the applnt to issues presented in crs-appeal w/in 10 days aftr srvc of applnts rply brief. (cc: Bkcy Judge, Clerk-Bkcy Crt, Clerk-Bkcy App Crt, Dist Crt Judge, all parties) (la) [Entry date 11/09/00]
11/16/00	17	NOTICE of corr address /telephone num fac no & lead cnsl for the appellant by appellant USA (am) [Entry date 11/21/00]
11/20/00	18	NOTICE by appellant USA of flg of "standing order" (la) [Entry date 11/28/00]

DATE	DOCKET NUMBER	PROCEEDINGS
11/21/00	19	EXCERPT OF RECORD filed by appellant USA. (la) [Entry date 11/29/00]
11/21/00	20	STIPULATION and ORDER by Judge Virginia A. Phillips extending ti to file appellant's opening brief. (kg) [Entry date 11/30/00]
11/24/00	21	APPELLANT's Opening Brief by appellant USA; appellant's brief ddl satisfied (mrgo) [Entry date 12/06/00]
12/11/00	22	STIPULATION and ORDER by Judge Virginia A. Phillips for ext of ti to fi appellee's br to 12/20/00 (mrgo) [Entry date 12/13/00]
12/21/00	23	MINUTES: Cnsl are hereby ntfd tht effec 1/16/01 the Hon Virginia A. Phillips US Dist Judge of the Eastern Div of the USDC will be loc @ the addr listed. All sched hrgs will be hld @ said location. by Judge Virginia A. Phillips CR: MAria Beesley (am) [Entry date 12/26/00]

DATE	DOCKET NUMBER	PROCEEDINGS
2/21/00	24	APPELLEE's brief by appellee Franceso Briguglio, appellee Angela Briguglio; appellee's brief ddl satisfied (am) [Entry date 12/26/00]
12/21/00	25	APPELLEE's brief by appellee Franceso Briguglio, appellee Angela Briguglio (mrgo) [Entry date 12/27/00]
1/2/01	26	APPELLANT's reply Brief by appellant USA (mrgo) [Entry date 01/04/01]
3/23/01	27	ORDER that the bankrupty crts ruling sustaining the clm obj is AFFIRMED. by Judge Virginia A. Phillips terminating case (M D JS-6) (ENT 3/26/01) (am) [Entry date 03/26/01]
5/21/01	28	NOTICE OF APPEAL by appellant USA to 9th C/A from Dist. Court ord ent 3/26/01 [27-2] (cc: John S. Gordon, Edward M. Robbins, Gregory A. Roth; Haberbush & Campbell; Office of the U.S. Trustee; Edwina E. Dowell; Jerome H. Fridkin; Ron S.

DATE	DOCKET NUMBER	PROCEEDINGS
		Chun; Walter Ryan) Fee: Waived (ghap) [Entry date 05/21/01]
5/21/01	29	TRANSCRIPT DESIGNATION and ordering form for dates: None Requested. (ghap) [Entry date 05/21/01]
6/1/01	30	CERTIFICATE of Record Transmitted to USCA (cc: all parties) (ghap) [Entry date 06/01/01]
6/4/01	31	NOTICE OF No Need by Applnt For Transcript For Appeal re appeal [28-1] (pjap) [Entry date 06/04/01]
6/26/01	32	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [28-1] 01-55954 (weap) [Entry date 06/26/01]
6/26/01	33	NOTICE RE Transcript Designation & order form; Declaration of Gregory A. Roth [28-1] (weap) [Entry date 06/26/01]

DATE	DOCKET NUMBER	PROCEEDINGS
8/28/01	34	ORDER FROM USCA The crt has determ appls will not be selected for inclusion in the Mediation Program. All fur inquiries re these appls, incl req for ext of time, should be directed to Clk's ofc. These appls are consol. Brief sched set as fol: Applnt shall fl opening brief on or bef 09/21/01, aplle's shall fl ans on or bef 11/07/01, aplnt may fl optional reply brief on or bef 11/21/01. A fur ext for filing either ot these briefs shall require a showing of extra-ordinary & compelling circum-stances. 9th CCA R 31-2.2(a) (01-55954) (cbr) [Entry date 09/10/01]
4/12/02	35	CLERK'S record on appeal transmitted to Circuit [28-1] vols: 1; 1 voluminous folder (DOC #19). (01-55954) (wdc) [Entry date 04/12/02]

DATE	DOCKET NUMBER	PROCEEDINGS
10/7/02	36	ORDER FROM USCA: Aplles are directed to file resp to Applnt's petn for rehearing & petn for rehearing en banc fld 09/23/02. Resp shall not ex-ceed 15 pages & shall be fld within 21 days of filing date of ord. Aplles will provide this crt w/ 50 cpys. (01-55954) (wdc) [Entry date 10/11/02]
12/5/02	—	LODGED CC 9th CCA JUDG-MENT of the said District Court affirmed (FWD TO CRD) (01-55954) (ghap) [En-try date 12/20/02]
12/19/02	37	RECORD on appeal returned from U.S. Court of Appeals re appeal [28-1] vols: 1; Brown folders 1, doc# 19. (cbr) [Entry date 02/11/03]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-55953

UNITED STATES OF AMERICA, APPELLANT

v.

ABEL COSMO GALLETTI; SARAH GALLETTI, APPELLEES

DOCKET ENTRIES

DATE	PROCEEDINGS
6/22/01	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): N. setting schedule as follows: appellant's opening brief is due 8/1/01; appellees' brief is due 8/31/01,; appellants' reply brief is due 9/14/01; [01-55953] (pg) [01-55953]
6/22/01	Filed certificate of record on appeal RT filed in DC: none requested. [01-55953] (pg) [01-55953]
6/22/01	Filed Gregory A. Roth for Appellant USA Civil Appeals Docketing Statement served on 5/21/01 (to CONFATT) [01-55953] [01-55953] (pg) [01-55953]
6/22/01	Received Appellant USA notice of non-designation of reporter's transcript. (actual date rcvd 6/5/01) (Casefile) [01-55953] (gva) [01-55953]

DATE	PROCEEDINGS
6/22/01	Received notice of representation of Gregory Roth as csl for aplt; served on 6/4/01 (actual date rcvd 6/5/01) (Casefile) [01-55953] (gva) [01-55953]
6/28/01	Filed order CONFATT (bsp) . . . . A settlement assessment conf will be held by tele on 7/10/01 at 10am PST . . . The br sch shall remain in effect. [01-55953] (crw) [01-55953]
6/29/01	Received notice of appearance of Andrea Tebbets as csl for USA; served on 6/28/01 (Casefile) [01-55953] (gva) [01-55953]
6/29/01	Filed notice of appearance of Andrea Tebbets for USA [01-55953] (crw) [01-55953]
7/3/01	Filed motion & clerk order Promo: (Deputy Clerk: jlc) Aplt's unopposed mnt for an ex.tm.f the opening br is granted. The opening br is now due 8/21/01. The ans br is due 9/20/01. The optional rpy br is due 14 days from service of the ans br. The clerk shall substitute the following aty as csl of record for aplt Andrea R. Tebbets, Tax Division Department of Justice P.O. Box 502 WA DC 20044. (mtn rcvd 6/28/01) [4198434-1] [01-55953] (gva) [01-55953]

DATE	PROCEEDINGS
8/22/01	Filed order CONFATT (MAC) Case not selected for program. Counsel interested in obtaining settlement assistance or program information should contact mediation office in Seattle. Counsel are requested to serve copies of this order on their clients. These appeals (01-55953 and 01-55954 are consolidated. Briefing schedule is amended as follows: appellants' brief, excerpts of record are due 9/21/01; appellees' brief due 11/7/01; optional reply brief due on or before 11/21/01. The following page limitations shall govern briefing in this appeal: Opening brief shall be no more than 35 pages if monotype or typewritten, or 15,400 words if proportionately spaced; answering brief shall be no more than 35 pages if monotype or typewritten, or 15,400 words if proportionately spaced. [01-55953, 01-55954] (em) [01-55953 01-55954]
9/19/01	Filed order CONFATT (MAC) The br sch previously set by the ct is amended as follows: aplt shall file an opening br on or before 10/1/01; aples shall file an ans br on or before 11/19/01; aplt may file an optional rpy br on or before 12/3/01. [01-55953, 01-55954] (gva) [01-55953 01-55954]

DATE	PROCEEDINGS
	opening brief (Informal: n) 40 pages 5 Excs.; served on 10/1/01 [01-55953, 01-55954] (gva) [01-55953 01-55954]
10/24/01	Received notice of appearance of Thomas J. Clark as csl for aple; served on 10/1/01 (Casefile) [01-55953, 01-55954] (gva) [01-55953 01-55954]
11/20/01	Filed motion & clerk order Promo: (Deputy Clerk: jlc) . . . The unopposed mtn are granted, and aples shall file one consolidated ans br. The ans br is now due 12/10/01. Aples' mtn additionally request an ex.tm. on behalf of aplt to file aplt's rpy br. The parties are reminded that any request for relief must be submitted by csl for the respective party. The ct, on its own mtn, extends the due date for the rpy br. The optional rpy br is due 12/31/01. Any further ex.tm.f the brs is disfavored. (mtn rcvd 11/15/01) [4303355-1] [01-55953, 01-55954] (gva) [01-55953 01-55954]
12/10/01	Filed original & 15 copies Aples' ans br of 56 pages; minor deficiency: (needs Statement of Related Cases); served on 12/10/01. Notified csl. (gva) [01-55953 01-55954]
12/19/01	Received Aples' satisfaction of (minor) brief deficiency; (Statement of Related Cases); served on 12/18/01 (Records). [01-55953, 01-55954] (gva) [01-55953 01-55954]

DATE	PROCEEDINGS
1/7/02	Received Mark R. Campbell's letter dated 12/27/01 requesting correction to docket - deleted attorneys not associated with appellees and terminated Mr. Haberbush (counsel for aples at bacnkrupcty court leve) per Mr. Campbell (CASEFILE) [01-55953, 01-55954] (pg) [01-55953 01-55954]
1/8/02	Filed original & 15 copies USA's reply brief (Informal: n) 20 pages; served on 12/31/01 [01-55953, 01-55954] (gva) [01-55953 01-55954]
1/27/02	Calendar check performed [01-55953, 01-55954] (aw) [01-55953 01-55954]
3/10/02	Calendar materials being prepared. [01-55953, 01-55954] [01-55953, 01-55954] (aw) [01-55953 01-55954]
3/15/02	CALENDARED: PAS May 9, 2002. 9:00 am Courtroom 3 [01-55953, 01-55954] (rei) [01-55953 01-55954]
3/19/02	Filed order CONFATT (MAC) A further settlement conference will be held by telephone on 3/29/02, at 9:30 am. Pacific time (12:30 pm ET). [01-55953] (gva) [01-55953]
4/9/02	FILED CERTIFIED RECORD ON APPEAL: ONE CLERKS RECORD, ONE BULKY DOCUMENT, FROM TRANSMITTAL [01-55953] (stev) [01-55953]

DATE	PROCEEDINGS
4/15/02	Received notice of representation of Thomas J. Clark as csl for USA; served on 4/11/02 (faxed to Panel) [01-55953, 01-55954] (gva) [01-55953 01-55954]
5/9/02	ARGUED AND SUBMITTED TO Andrew J. KLEINFELD, Susan P. GRABER, Susan R. Bolton [01-55953, 01-55954] (rmw) [01-55953 01-55954]
8/8/02	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Andrew J. KLEINFELD, concurring; Susan P. GRABER, author; Susan R. Bolton, concurring.) FILED AND ENTERED JUDGMENT. [01-55953, 01-55954] (gva) [01-55953 01-55954]
9/23/02	[4538367] Filed original & 50 copies Appellant USA petition for panel rehearing and petition for rehearing en banc of 17 pages [4,190 words]; served on 9/20/02 (Panel And All Active Judges) [01-55953, 01-55954] (gva) [01-55953 01-55954]
10/1/02	Filed order (Andrew J. KLEINFELD, Susan P. GRABER, Susan R.Bolton) Aples are directed to file a response to Aplt's petition for rehearing and petition for rehearing en banc filed 9/23/02. The response shall not exceed 15 pages and shall

DATE	PROCEEDINGS
	be filed within 21 days of the filing date of this order. Aples will provide this ct with 50 copies. [01-55953, 01-55954] (gva) [01-55953 01-55954]
10/22/02	Filed Aples' response to aplt's petition for rehearing with suggestion for rehearing en banc of 16 pages; [4,161 words] served on 10/21/02 (Panel And All Active Judges) [01-55953, 01-55954] (gva) [01-55953 01-55954]
11/20/02	Filed order and amended opinion (Judges Andrew J. KLEINFELD, Susan P. GRABER, Susan R. Bolton) (Orig. opinion id: . . . The petition for rehearing and petition for rehearing en banc are denied. No further petitions for rehearing or rehearing en banc may be filed. AFFIRMED. [4501501-1] [4538367-1] [01-55953, 01-55954] (gva) [01-55953 01-55954]
12/2/02	MANDATE ISSUED [01-55953, 01-55954] (gva) [01-55953 01-55954]
2/10/03	Received letter from the Supreme Court dated 2/6/03 re: application for an extension of time to file a petition for writ of certiorari (CASEFILES) [01-55953, 01-55954] (tm) [01-55953 01-55954]
3/24/03	Rec'd notice of change of Suite number from Mark R. Campbell for aples: new Suite No. 444; dated 3/20/03. (Casefile) [01-55953, 01-55954] (gva) [01-55953 01-55954]

DATE	PROCEEDINGS
3/27/03	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-1389 filed on 3/20/03. (Casefile) [01-55953, 01-55954] (gva) [01-55953 01-55954]
6/26/03	Received notice from Supreme Court, petition for certiorari GRANTED on 6/23/03. Supreme Court No. 02-1389 (Panel)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-55954

UNITED STATES OF AMERICA, APPELLANT

v.

FRANCESCO BRIGUGLIO; ANGELA BRIGUGLIO, APPELLEES

DOCKET ENTRIES

DATE	PROCEEDINGS
6/22/01	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): N. setting schedule as follows: appellant's opening brief is due 8/1/01; appellees' brief is due 8/31/01,; appellants' reply brief is due 9/14/01; [01-55954] (pg) [01-55954]
6/22/01	Filed certificate of record on appeal RT filed in DC none requested. [01-55954] (pg) [01-55954]
6/22/01	Filed Gregory A. Roth for Appellant USA Civil Appeals Docketing Statement served on 5/21/01 (to CONFATT) [01-55954] [01-55954] (pg) [01-55954]
7/3/01	Filed motion of Appellant and deputy clerk order: (Deputy Clerk: jlc) Aplts unopposed

DATE	PROCEEDINGS
	mtn for an ext of time to file the opn br is granted. The opn br is due 8/21/01, the ans br is due 9/20/01. The opt rpy br is due 14 days . . . The clk shall substitute the following atty as csl of record for aplt: Andrea R. Tebbets, Tax Div. Dept of Justice, POB 502 Wash DC 20044, 202-353-9703. (Motion recvd 6/28/01) [01-55954] (crw) [01-55954]
7/17/01	Received Appellant USA notice of non-designation of reporter's transcript. [01-55954] (crw) [01-55954]
7/17/01	Filed notice of appearance of John S. Gordon Edward M. Robbins, Jr., Gregory A. Roth for USA [01-55954] (crw) [01-55954]
8/22/01	Filed order CONFATT (MAC) Case not selected for program . Counsel interested in obtaining settlement assistance or program information should contact mediation office in Seattle. Counsel are requested to serve copies of this order on their clients. These appeals (01-55953 and 01-55954 are consolidated. Briefing schedule is amended as follows: appellants' brief, excerpts of record are due 9/21/01 ; appellees' brief due 11/7/01; optional reply brief due on or before 11/21/01. The following page lijmitations

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10/24/01	Received notice of appearance of Thomas J. Clark as csl for aple; served on 10/1/01 (Casefile) [01-55953, 01-55954] (gva) [01-55953 01-55954]

DATE	PROCEEDINGS
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1/27/02	Calendar check performed [01-55953, 01-55954] (aw) [01-55953 01-55954]
3/10/02	Calendar materials being prepared. [01-55953, 01-55954] [01-55953, 01-55954] (aw) [01-55953 01-55954]
3/15/02	CALENDARED: PAS May 9, 2002. 9:00 am Courtroom 3 [01-55953, 01-55954] (rei) [01-55953 01-55954]
4/15/02	Received notice of representation of Thomas J. Clark as csl for USA; served on 4/11/02 (faxed to Panel) [01-55953, 01-55954] (gva) [01-55953 01-55954]
4/18/02	FILED CERTIFIED RECORD ON APPEAL 1 clerk's record, 1 bulky docs. # 19. From d.c. transmittal. [01-55954] (jk) [01-55954]
5/9/02	ARGUED AND SUBMITTED TO Andrew J. KLEINFELD, Susan P. GRABER, Susan R. Bolton [01-55953, 01-55954] (rmw) [01-55953 01-55954]
8/8/02	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Andrew J.

DATE	PROCEEDINGS
	KLEINFELD, concurring; Susan P. GRABER, author; Susan R. Bolton, concurring.) FILED AND ENTERED JUDGMENT. [01-55953, 01-55954] (gva) [01-55953 01-55954]
9/23/02	[4538367] Filed original & 50 copies Appellant USA petition for panel rehearing and petition for rehearing en banc of 17 pages [4,190 words]; served on 9/20/02 (Panel And All Active Judges) [01-55953, 01-55954] (gva) [01-55953 01-55954]
10/1/02	Filed order (Andrew J. KLEINFELD, Susan P. GRABER, Susan R. Bolton) Aples are directed to file a response to Aplt's petition for rehearing and petition for rehearing en banc filed 9/23/02. The response shall not exceed 15 pages and shall be filed within 21 days of the filing date of this order. Aples will provide this ct with 50 copies. [01-55953, 01-55954] (gva) [01-55953 01-55954]
10/22/02	Filed Aples' response to aplt's petition for rehearing with suggestion for rehearing en banc of 16 pages; [4,161 words] served on 10/21/02 (Panel And All Active Judges) [01-55953, 01-55954] (gva) [01-55953 01-55954]
11/20/02	Filed order (Andrew J. KLEINFELD, Susan P. GRABER, Susan R. Bolton): The petition for rehearing and petition for

DATE	PROCEEDINGS
	rehearing en banc are denied. No further petitions for rehearing or rehearing en banc may be filed. [01-55953, 01-55954] (gva) [01-55954]
11/20/02	Filed order and amended opinion (Judges Andrew J. KLEINFELD, Susan P. GRABER, Susan R. Bolton) (Orig. opinion id: . . . The petition for rehearing and petition for rehearing en banc are denied. No further petitions for rehearing or rehearing en banc may be filed. AFFIRMED. [4501501-1] [4538367-1] [01-55953, 01-55954] (gva) [01-55953 01-55954]
12/2/02	MANDATE ISSUED [01-55953, 01-55954] (gva) [01-55953 01-55954]
2/10/03	Received letter from the Supreme Court dated 2/6/03 re: application for an extension of time to file a petition for writ of certiorari (CASEFILES) [01-55953, 01-55954] (tm) [01-55953 01-55954]
3/24/03	Rec'd notice of change of Suite number from Mark R. Campbell for aples: new Suite No. 444; dated 3/20/03. (Casefile) [01-55953, 01-55954] (gva) [01-55953 01-55954]
3/27/03	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-1389 filed on 3/20/03. (Casefile) [01-55953, 01-55954] (gva) [01-55953 01-55954]

DATE	PROCEEDINGS
6/26/03	Received notice from Supreme Court, petition for certiorari GRANTED on 6/23/03. Supreme Court No. 02-1389 (Panel) (gva) [01-55953 01-55954]

Illegible
03

100

PROOF OF CLAIM

FORM B10 (Official Form 10)(9/97)

UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA		PROOF OF CLAIM
Name of Debtor: ABEL COSMO & SHARON GALLETTI	Case Number: LA99-48587 ER	
Name of Creditor (The person or entity to whom the debtor owes money or property): Department of the Treasury - Internal Revenue Service	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.	
Name and addresses where notices should be sent: Internal Revenue Service, 290 N. "D" ST., Stop SPB-BK, San Bernardino, CA 92401. Telephone number: (909) 388-8303 Creditor #:8	☐ Check box if you have never received any notices from the bankruptcy court in this case. ☐ Check box if the address differs from the address on the envelope sent to you by the court.	THIS SPACE IS FOR COURT USE ONLY
Account or other number by which creditor identifies debtor: see attachment	Check here ☐ replaces / If this claim ☐ amends a previously filed claim, dated: _____	

1. Basis for Claim

- ☐ Goods sold
- ☐ Services performed
- ☐ Money loaned
- ☐ Personal injury/wrongful death
- ☒ Taxes
- ☐ Other _____
- ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
- ☐ Wages, salaries, and compensation (fill out below)

  Your SS #: _____ _____ _____

  Unpaid compensation for services performed from _____ (date) to _____ (date)

2. Date debt was incurred: see attachment

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $ 395,179.89

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below.

☒ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. Secured Claim.

☒ Check this box if your claim is secured by collateral (including a right of setoff).

Brief Description of Collateral:

☒ Real Estate ☒ Motor Vehicle ☒ Other see below*

Value of Collateral: $ see below*

*All of debtor(s) right, title and interest to property - 26 U.S.C § 6321.

Amount of arrearage and other charges at time case filed included in secured claim, if any: $ 395,006.37

6. Unsecured Priority Claim.

☒ Check this box if you have an unsecured priority claim

Amount entitled to priority $ 160.36

Specify the priority of the claim:

- ☐ Wages, salaries, or commissions (up to $4000),* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3).
- ☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4).
- ☐ Up to $1800* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6).
- ☐ Alimony, maintenance, or support owed to spouse, former spouse, or child - 11 U.S.C. § 507(a)(7).
- ☒ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8).
- ☐ Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(___).

*Amounts are subject to adjustment on 4/1/98 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

7. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

8. Supporting Documents: *Attach copies of supporting documents*, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

9. Date-Stamped Copy: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

Date	Signed: print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):	THIS SPACE IS FOR COURT USE ONLY
02/29/2000	R. VASQUEZ REVENUE OFFICER / Chief, Insolvency Unit	

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

101

Proof of Claim for Internal Revenue Taxes

Department of the Treasury/Internal Revenue Service

In the Matter of: ABEL COSMO & SHARON GALLETTI
2411 DALADIER DR
RANCHO PALOS VERD, CA 90275

Form 10
Attachment

Docket Number
LA99-48587
Type of Bankruptcy Case
Chapter 13
Date of Petition
10/20/1999

This claim is not subject to any setoff or counterclaim.

Please provide interest on secured amounts at 7 %

Secured Claims (Notices of Federal tax lien filed under internal revenue laws before petition date)

Taxpayer ID Number	Kind of Tax	Tax Period	Date Tax Assessed	Tax Due	Penalty to Petition Date	Interest to Petition Date	Notice of Tax Lien Filed: Date	Office Location
86-0641090	FUTA	12/31/1992	02/07/1994	$7,495.76	$3,747.58	$6,964.51	02/03/1998	SEC OF STATE
							02/06/1998	LOS ANGELES
86-0641090	VT-FICA	06/30/1993	01/03/1994	$2,599.39	$128.52	$5,241.83	02/06/1998	LOS ANGELES
86-0641090	VT-FICA	09/30/1993	06/20/1994	$493.67	$2,892.06	$1,946.20	02/06/1998	LOS ANGELES
86-0641090	VT-FICA	12/31/1993	03/28/1994	$0.00	$11,378.83	$7,074.93	02/06/1998	LOS ANGELES
86-0641090	FUTA	12/31/1993	05/09/1994	$3,357.03	$2,397.60	$3,079.07	02/06/1998	LOS ANGELES
86-0641090	VT-FICA	03/30/1994	07/11/1994	$0.00	$15,383.07	$8,995.33	02/06/1998	LOS ANGELES
86-0641090	VT-FICA	06/30/1994	09/12/1994	$93,301.62	$41,174.64	$63,399.11	02/06/1998	LOS ANGELES
86-0641090	VT-FICA	09/30/1994	12/19/1994	$0.00	$5,842.81	$3,024.29	02/06/1998	LOS ANGELES
86-0641090	FUTA	12/31/1994	07/17/1995	$45,973.69	$27,968.98	$30,687.37	02/06/1998	LOS ANGELES
86-0641090	CIVIL PEN	12/31/1994	07/17/1995	$50.00	$0.00	$21.49	02/03/1998	SEC OF STATE
							02/06/1998	LOS ANGELES
86-0641090	VT-FICA	03/30/1995	06/05/1995	$0.00	$262.85	$124.94	02/06/1998	LOS ANGELES
				$153,271.16	$111,176.94	$130,558.27		

Total Amount of Secured Claims: $395,006.37

Unsecured Priority Claims under section 507(a)(8) of the Bankruptcy Code

Taxpayer ID Number	Kind of Tax	Tax Period	Date Tax Assessed	Tax Due	Interest to Petition Date
86-0641090	VT-FICA	09/30/1995	12/04/1995	$114.52	$45.84

Total Amount of Unsecured Priority Claims: $160.36

Unsecured General Claims

Penalty to date of petition on unsecured priority claims (including interest thereon) $13.16

Total Amount of Unsecured General Claims: $13.16

BEST AVAILABLE COPY

FORM B10 (Official Form 10)(9/97)

UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA		PROOF OF CLAIM
Name of Debtor: FRANCESCO & ANGELA BRIGUGLIO	Case Number: LA00-13574 ER	
NOTICE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" of payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (The person or entity to whom the debtor owes money or property): Department of the Treasury - Internal Revenue Service	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.	
Name and address where notices should be sent: Internal Revenue Service, 290 N. "D" ST., Stop SPB-BK, San Bernardino, CA 92401	☐ Check box if you have never received any notices from the bankruptcy court in this case.	
Telephone number: (909) 388-8303 Creditor #:11	☐ Check box if the address differs from the address on the envelope sent to you by the court.	THIS SPACE IS FOR COURT USE ONLY
Account or other number by which creditor identifies debtor: see attachment	Check here ☐ replaces if this claim ☐ amends a previously filed claim, dated: _____	

1. Basis for Claim

- ☐ Goods sold
- ☐ Services performed
- ☐ Money loaned
- ☐ Personal injury/wrongful death
- ☒ Taxes
- ☐ Other _____

- ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
- ☐ Wages, salaries, and compensation (fill out below)

  Your SS #: _____ _____ _____

  Unpaid compensation for services performed from _____ (date) to _____ (date)

2. Date debt was incurred: see attachment

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $ 427,402.74

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below.

☒ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. Secured Claim.

☒ Check this box if your claim is secured by collateral (including a right of setoff).

Brief Description of Collateral:

☒ Real Estate ☒ Motor Vehicle ☒ Other see below*

Value of Collateral: $ see below*

* All of debtor's right, title and interest to property - 26 U.S.C § 6321.

Amount of arrearage and other charges at time case filed included in secured claim, if any: $ 403,264.06

6. Unsecured Priority Claim.

☒ Check this box if you have an unsecured priority claim

Amount entitled to priority $ 23,266.27

Specify the priority of the claim:

- ☐ Wages, salaries, or commissions (up to $4000),* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3).
- ☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4).
- ☐ Up to $1800* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6).
- ☐ Alimony, maintenance, or support owed to spouse, former spouse, or child - 11 U.S.C. § 507(a)(7).
- ☒ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8).
- ☐ Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(___).

* Amounts are subject to adjustment on 4/1/98 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

7. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

8. Supporting Documents: *Attach copies of supporting documents*, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

9. Date-Stamped Copy: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):	THIS SPACE IS FOR COURT USE ONLY
04/21/2000	R. VASQUEZ, Chief, Insolvency Unit, REVENUE OFFICER	

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years or both. 18 U.S.C. §§ 152 and 3571.

Proof of Claim for Internal Revenue Taxes

Department of the Treasury/Internal Revenue Service

Form 10
Attachment

In the Matter of: FRANCESCO & ANGELA BRIGUGLIO
1701 W 27TH ST
SAN PEDRO, CA 90732

Docket Number	Type of Bankruptcy Case	Date of Petition
LA00-13574	Chapter 13	02/04/2000

This claim is not subject to any setoff or counterclaim.

Secured Claims (Notices of Federal tax lien filed under internal revenue laws before petition date)

Taxpayer Number	Kind of Tax	Tax Period	Date Tax Assessed	Tax Due	Penalty to Petition Date	Interest to Petition Date	Notice of Tax Lien Filed: Date	Office Location
-0641090	FUTA	12/31/1992	02/07/1994	$0.00	$0.00	$1,460.63	02/03/1998	SEC OF STATE
							02/06/1998	LOS ANGELES
-0641090	FUTA	12/31/1992	06/17/1996	$7,495.76	$3,523.01	$5,891.08	02/03/1998	SEC OF STATE
							02/06/1998	LOS ANGELES
-0641090	VT-FICA	06/30/1993	01/03/1994	$0.00	$2,727.91	$5,427.25	02/06/1998	LOS ANGELES
-0641090	VT-FICA	09/30/1993	06/20/1994	$493.67	$2,892.06	$2,870.65	02/06/1998	LOS ANGELES
-0641090	VT-FICA	12/31/1993	03/28/1994	$0.00	$7,512.38	$11,378.83	03/28/1994	LOS ANGELES
-0641090	FUTA	12/31/1993	05/09/1994	$3,357.03	$2,397.60	$3,270.17	02/06/1998	LOS ANGELES
-0641090	VT-FICA	03/31/1994	07/11/1994	$324.92	$15,058.15	$9,571.42	02/06/1998	LOS ANGELES
-0641090	VT-FICA	06/30/1994	09/12/1994	$80,125.46	$47,558.76	$54,342.80	02/06/1998	LOS ANGELES
-0641090	VT-FICA	09/30/1994	12/19/1994	$0.00	$5,842.81	$3,234.48	02/06/1998	LOS ANGELES
-0641090	FUTA	12/31/1994	07/17/1995	$0.00	$2,683.46	$1,480.38	02/06/1998	LOS ANGELES
-0641090	FUTA	12/31/1994	11/11/1996	$45,973.69	$25,285.52	$31,414.01	02/06/1998	LOS ANGELES
-0641090	CIVIL PEN	12/31/1994	08/07/1995	$50.00	$0.00	$23.19	02/03/1998	SEC OF STATE
							02/06/1998	LOS ANGELES
-0641090	VT-FICA	03/31/1995	06/05/1995	$0.00	$262.85	$134.13	02/06/1998	LOS ANGELES
				$137,820.53	$135,744.91	$129,699.02		

Total Amount of Secured Claims: $403,264.06

Unsecured Priority Claims under section 507(a)(8) of the Bankruptcy Code

Taxpayer Number	Kind of Tax	Tax Period	Date Tax Assessed	Tax Due	Interest to Petition Date
-0641090	VT-FICA	09/30/1995	10/26/1998	$114.52	$49.64
90-40-7057	INCOME	12/31/1997	11/30/1998	$0.00	$1,389.40
-6537344	PTRSHP	12/31/1999	1 ESTIMATE-NO RETURN	$1,500.00	$1.31
80-40-7057	INCOME	12/31/1999	1 ESTIMATE-NO RETURN	$20,211.40	$0.00
				$21,825.92	$1,440.35

Total Amount of Unsecured Priority Claims: $23,266.27

TAX HAS BEEN ESTIMATED BECAUSE OUR RECORDS SHOW NO RETURN FILED. AS SOON AS THE DEBTOR FILES THE RETURN OR PROVIDES OTHER INFORMATION AS REQUIRED BY LAW, THE CLAIM CAN BE AMENDED.

'roof of Claim for
ıternal Revenue Taxes

:partment of the Treasury/Internal Revenue Service

Form 10
Attachment

In the Matter of: FRANCESCO & ANGELA BRIGUGLIO
1701 W 27TH ST
SAN PEDRO, CA 90732

Docket Number
LA00-13574
Type of Bankruptcy Case
Chapter 13
Date of Petition
02/04/2000

nsecured General Claims

enalty to date of petition on unsecured priority claims (including interest thereon) $872.41

Total Amount of Unsecured General Claims: $872.41

-64
1240

Supreme Court, U.S.
FILED
SEP 5 - 2003
OFFICE OF THE CLERK

No. 02-1389

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL COSMO GALLETTI AND SARAH GALLETTI; AND FRANCESCO BRIGUGLIO AND ANGELA BRIGUGLIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in order to enforce the derivative liability of partners for the tax debts of their partnership, the United States must make a separate assessment of the taxes owed by the partnership against each of the partners directly.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	2
Summary of argument	7
Argument:	
The United States may enforce the derivative liability of partners for tax debts owed by their partnership without making a separate assessment against each of the partners individually	9
A. The Internal Revenue Code does not require that a partner be assessed individually for taxes owed by the partnership	10
1. The derivative liability of partners for the tax debts of a partnership arises under state law, not under the Internal Revenue Code	10
2. No assessment of partners is required to permit collection of their derivative liability for taxes owned by the partnership	12
B. California partnership law does not preclude collection of the partnership tax debts involved in this case	25
C. The decision of the court of appeals would impede and burden routine enforcement of the tax laws	27
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Anderson v. *United States*, 15 F. Supp. 216 (Ct. Cl. 1936), cert. denied, 300 U.S. 675 (1937) 8, 14, 15, 21

Cases—Continued: Page

Armadillo Corp., In re, 410 F. Supp. 407 (D. Colo. 1976), aff'd, 561 F.2d 1382 (10th Cir. 1977) 16
Ballard v. *United States*, 17 F.3d 116 (5th Cir. 1994) 11
Blackston v. *United States*, 778 F. Supp. 244 (D. Md. 1991) 16
Calvey v. *United States*, 448 F.2d 177 (6th Cir. 1971) 11
Crockett, In re, 150 F. Supp. 352 (N.D. Cal. 1957) 10
Danning v. *United States (In re Montgomery)*, 532 F.2d 725 (9th Cir. 1976) 10
El Paso Refining, Inc. v. *IRS*, 205 B.R. 497 (Bankr. W.D. Tex. 1996) 4
Goldston v. *United States*, 104 F.3d 1198 (10th Cir. 1997) 15
Huff v. *United States*, 10 F.3d 1440 (9th Cir. 1993) 13
Jersey Shore State Bank v. *United States*, 479 U.S. 442 (1987) 23
Katchen v. *Landy*, 382 U.S. 323 (1966) 27
Laing v. *United States*, 423 U.S. 161 (1976) 14
Leighton v. *United States*, 289 U.S. 506 (1933) 18, 19
March v. *IRS*, 335 F.3d 1186 (10th Cir. 2003) 13
Marvel v. *United States*, 719 F.2d 1507 (10th Cir. 1983) 24
Otte v. *United States*, 419 U.S. 43 (1974) 16
Payne v. *United States*, 247 F.2d 481 (8th Cir. 1957), cert. denied, 355 U.S. 923 (1958) 21
Remington v. *United States*, 210 F.3d 281 (5th Cir. 2000) 11
The Nitroglycerine Case, 82 U.S. (15 Wall.) 524 (1872) 28
Tony Thornton Auction Servs., Inc. v. *United States*, 791 F.2d 635 (8th Cir. 1986) 11
United States v. *Berman*, 825 F.2d 1053 (6th Cir. 1987) 16

Cases—Continued: Page

United States v. *Botefuhr*, 309 F.3d 1263 (10th Cir. 2002) 21, 22
United States v. *California*, 507 U.S. 746 (1993) 12
United States v. *Chila*, 871 F.2d 1015 (11th Cir. 1989) 16
United States v. *Coson*, 286 F.2d 453 (9th Cir. 1961) 24
United States v. *Dixieline Fin., Inc.*, 594 F.2d 1311 (9th Cir. 1979) 14, 21, 28
United States v. *First Nat'l Bank of Circle*, 652 F.2d 882 (9th Cir. 1981) 23
United States v. *Hays*, 877 F.2d 843 (10th Cir. 1989) 11
United States v. *Hunter Eng'rs & Constructors, Inc.*, 789 F.2d 1436 (9th Cir. 1986), cert. denied, 479 U.S. 1063 (1987) 16, 23, 24, 28
United States v. *John Hancock Mut. Life Ins. Co.*, 364 U.S. 301 (1960) 12
United States v. *Papandon*, 331 F.3d 52 (2d Cir. 2003) 11
United States v. *Summerlin*, 310 U.S. 414 (1940) 12
United States v. *Updike*, 281 U.S. 489 (1930) 12, 19
United States v. *Walker*, 217 F. Supp. 888 (W.D.S.C. 1963) 21
United States v. *Wright*:
868 F. Supp. 1070 (S.D. Ind. 1994), rev'd, 57 F.3d 561 (7th Cir. 1995) 19
57 F.3d 561 (7th Cir. 1995) 3, 6, 19
Young v. *Riddle*:
60-1 U.S. Tax Cas. (CCH) ¶ 9381 (S.D. Cal. 1959), aff'd, 283 F.2d 909 (9th Cir. 1960) 10, 24
283 F.2d 909 (9th Cir. 1960) 6, 7, 10-11, 24, 25

Statutes and regulation: Page

Bankruptcy Code, 11 U.S.C. 101 *et seq.*:
Ch. 1, 11 U.S.C. 101:
11 U.S.C. 101 2
11 U.S.C. 101(5)(A) 9, 26
Ch. 3, 11 U.S.C. 301 *et seq.*:
11 U.S.C. 362(a)(1) 26
Ch. 5, 11 U.S.C. 501 *et seq.*:
11 U.S.C. 501(a) 26
11 U.S.C. 502 26
11 U.S.C. 502(a) 26
11 U.S.C. 502(b) 26
Ch. 13, 11 U.S.C. 1301 *et seq.* 3
Internal Revenue Code (26 U.S.C.):
§ 701 2
§ 702 2
§ 2502(c) 21
§ 3101 16
§ 3102 ..... 2, 17
§ 3102(a) 16
§ 3102(b) 2, 16
§ 3111 ..... 2, 17
§ 3111(a) 2, 16
§ 3301 ..... 16, 17
§ 3401(d) 2, 17
§ 3403 16
§ 3404 2
§ 3505 22
§ 3505(a) 23
§ 3505(b) 23
§ 6201 2
§ 6201(a) 8, 13
§ 6203 ..... 2, 13
§ 6303(a) 16
§ 6321 16
§ 6322 15
§ 6323 24

Statutes and regulation—Continued: Page

§ 6324(b) 21
§§ 6331-6327 15
§§ 6331-6344 15
§ 6331(a) 16
§ 6501 ..... 2, 4, 12
§ 6501(a) 3, 4, 5, 11, 15, 17, 18, 25, 27
§ 6502 ..... 2, 12
§ 6502(a) 8, 11, 16, 17, 18, 21, 22
§ 6502(a)(1) 3, 18, 22, 25
§ 7701(a)(1) 5
§ 7701(a)(14) 5
Cal. Corp. Code (West Supp. 2003):
§ 151503 (repealed) 10
§ 15105 (repealed) 10
§ 16111(b) 10
§ 16306 ..... 2, 3
§ 16306(a) 10
§ 16307 2
§ 16307(c) 8, 9, 25, 26, 27
1996 Cal. Stat. ch. 1003 10
Uniform Partnership Act (1997) § 306, 6 U.L.A. 117 (2001) 10
26 C.F.R. 301.6203-1 ..... 13, 14

In the Supreme Court of the United States

No. 02-1389

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL COSMO GALLETTI AND SARAH GALLETTI; AND FRANCESCO BRIGUGLIO AND ANGELA BRIGUGLIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a), which superseded the initial opinion of the court (298 F.3d 1107), is reported at 314 F.3d 336.[1] The opinions of the district court (Pet. App. 18a-30a, 31a-43a) are reported at 88 A.F.T.R.2d (RIA) 5580 and 88 A.F.T.R.2d (RIA) 1639. The opinions of the bankruptcy court (Pet. App. 44a-55a, 56a-68a) are reported at 86 A.F.T.R.2d (RIA) 6433 and 86 A.F.T.R.2d (RIA) 6438.

[1] The opinion and judgment of the court of appeals, as well as the order denying the petition for rehearing, contain separate docket numbers for the associated bankruptcy cases of the Gallettis and the Briguglios, who are the general partners of the partnership whose tax liabilities are at issue in this case.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2002. The petition for rehearing was denied on November 20, 2002. Pet. App. 2a-3a. On February 6, 2003, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including March 20, 2003. The petition for a writ of certiorari was filed on that date, and was granted on June 23, 2003. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of 11 U.S.C. 101 and 502, 26 U.S.C. 3102, 3111, 3403, 3404, 6201, 6203, 6501 and 6502, and Cal. Corp. Code §§ 16306 and 16307 (West Supp. 2003) are set forth at Pet. App. 69a-73a.

STATEMENT

1. Respondents are the general partners of a partnership named Marina Cabrillo Partners. Pet. App. 4a. During the years relevant to this case, the partnership employed various workers and, as a consequence, accrued liability for federal employment taxes.[2] Federal employment taxes accrue against the "employer" (*e.g.*, 26 U.S.C. 3102(b), 26 U.S.C. 3111(a)) of any person who "performs or performed any service, of whatever nature, as the employee of such person." 26 U.S.C. 3401(d). Because the partnership was the "employer,"

[2] A partnership is not a taxable entity for federal income tax purposes. 26 U.S.C. 701. The Internal Revenue Code instead imposes direct income tax liability on the partners for the income realized by the partnership. 26 U.S.C. 702. As explained in the text, however, the partnership, as the "employer," is itself directly liable for the federal employment taxes associated with its employees. See Pet. App. 62a.

the withheld income taxes, social security (FICA) taxes and Federal Unemployment Tax Act (FUTA) taxes relating to its employees were direct liabilities of the partnership. Pet. App. 62a.

On various dates between 1994 and 1996, the Internal Revenue Service made assessments of the unpaid federal employment tax liabilities of the partnership that accrued for periods from 1992 through the first quarter of 1995. Each of these assessments was made within three years after the filing of the partnership's employment tax return. Pet. App. 4a-5a, 42a. As a consequence of those timely assessments (26 U.S.C. 6501(a)), the federal limitations period for commencing a judicial action to collect the unpaid tax liabilities of the partnership was extended to ten years from the dates of assessment (26 U.S.C. 6502(a)(1)).[3]

2. After respondents encountered financial difficulties, they sought protection from their creditors under Chapter 13 of the Bankruptcy Code. The United States filed proofs of claim in their personal bankruptcy cases to recover the unpaid federal employment taxes owed by the partnership. Pet. App. 45a, 57a.

a. Respondents objected to the proofs of claim. They acknowledged that, as general partners, they were derivatively liable for all lawful debts of the partnership under state law (Cal. Corp. Code § 16306 (West Supp. 2003)). They also acknowledged that the assessments of the employment taxes against the partnership were timely and valid. They contended, however, that

[3] "Until 1990 the statute of limitations for the collection of tax debts was six years from assessment. That year Congress increased the period to ten years. Pub. L. 101-508, amending 26 U.S.C. § 6502(a)." *United States* v. *Wright*, 57 F.3d 561, 562 (7th Cir. 1995).

federal law prohibits the collection of the tax liabilities of the partnership from its partners unless a separate assessment of the taxes has been made against the partners individually. Pet. App. 45a, 58a. They further contended that the United States is now barred by 26 U.S.C. 6501(a) from making such assessments against the partners because more than three years had elapsed since the partnership filed the tax returns for the periods for which the tax liabilities arose. Pet. App. 46a-47a, 59a.

In response, the government explained (i) that the assessments against the partnership were timely and valid and (ii) that the derivative liability of the general partners for the resulting debt of the partnership arises under state law, not under the Internal Revenue Code. Accordingly, when, as here, a valid assessment has been made of the tax liability of the *partnership*, no additional, individual assessment against the partners is required by federal law to permit suit to proceed against the partners for their derivative, state-law liability. Pet. App. 47a, 59a.

b. The bankruptcy court disallowed the government's claims, and the district court affirmed that ruling. Relying on the proposition that "a valid assessment is a prerequisite to tax collection" (Pet. App. 28a (quoting *El Paso Refining, Inc.* v. *IRS*, 205 B.R. 497, 499 (Bankr. W.D. Tex. 1996)), these courts held that the employment taxes owed by the partnership must be assessed against the partners directly before they could be collected directly from them. Because no assessment had been made against the partners individually within the three-year period provided by 26 U.S.C. 6501, the bankruptcy court and district court concluded that the government's claims are now barred in this case. Pet. App. 28a-29a, 41a-42a; *id.* at 51a-54a, 62a-66a.

3. The court of appeals affirmed. Pet. App. 1a-17a. The court first stated that, under Section 6501(a) of the Internal Revenue Code, the government is to collect tax deficiencies "by making an assessment against the taxpayer within three years of the filing of the taxpayer's return." Pet. App. 6a. The court reasoned that respondents, as general partners, are "taxpayers" who are subject to assessment for the employment taxes owed by the partnership. The court noted that the term "taxpayer" is defined in Section 7701(a)(14) of the Code as "any person subject to any internal revenue tax" and Section 7701(a)(1), in turn, defines the word "person" to include "an individual" as well as a "partnership." Pet. App. 7a-8a. Relying on these definitional provisions, the court concluded that, while "[t]he Partnership is a 'taxpayer' within the meaning of the statute, * * * so also is each individual [partner] a separate 'taxpayer'" subject to assessment for this tax. Pet. App. 8a.

The court next concluded that the timely assessments against the partnership in this case "extended the statute of limitations only with respect to the Partnership" and "left unaltered the limitations period applicable to [respondents]." Pet. App. 8a. Because the government did not "assess" the partnership's tax liabilities against the partners individually within three years after the partnership returns were filed, the court held that the government is now barred by Section 6501(a) from collecting those taxes from respondents. *Ibid.*

The court of appeals rejected the government's argument that assessments against the individual partners are unnecessary in this action brought to enforce the derivative, state-law liability of the partners for the valid debts of the partnership. The court acknowledged

that, "under California law, partners are 'personally liable for the debts and liabilities of the partnership, including its tax liability.'" Pet. App. 14a (quoting *Young* v. *Riddell*, 283 F.2d 909, 910 (9th Cir. 1960)). Even though "under state law each individual partner is *liable* for the debts of the partnership," the court stated that "a creditor may collect a debt for which the partner is jointly and severally liable only by first obtaining a judgment against the partner." Pet. App. 16a. The court concluded that, since "[t]he IRS has obtained no judgment against [respondents,]" and since "[t]he time for doing so has expired," the partners may not now be held liable for the tax debts of the partnership. *Ibid.*

4. In a petition for rehearing with suggestion for rehearing en banc, the government argued that the panel decision in this case conflicts with the decision of the Seventh Circuit in *United States* v. *Wright*, 57 F.3d 561 (1995). In response to the petition for rehearing, the court amended its opinion to state that "*Wright* is distinguishable because, in that case, the IRS had assessed both the partnership * * * and the individual partners." Pet. App. 2a. The court acknowledged that the action by the government to collect taxes owed by the partnership from the individual partners in *Wright* was brought *after* the end of the limitations period that would have been applicable if the individual partners had been directly liable for the tax under federal law. Pet. App. 3a. The court nonetheless stated that, because both the partners and the partnership received assessments in *Wright*, "[t]he Seventh Circuit * * * had no opportunity to address the question before us." *Ibid.*

SUMMARY OF ARGUMENT

The United States made a timely assessment of federal employment tax obligations owed by a partnership. When the partnership failed to pay, the United States sought to enforce these tax liabilities against respondents who, as general partners, were derivatively liable under state law for all valid debts of the partnership. The court of appeals erred in concluding that the United States could not enforce its derivative claim against the partners without first "assessing" the tax against each of the partners individually.

1. The taxes involved in this case accrued from the operations of a partnership. As a matter of federal law, the partnership itself was directly liable for those taxes. The derivative liability of the partners for the taxes owed by their partnership arose under state law, not under the provisions of the Internal Revenue Code. Under the applicable principles of state partnership law, it is well established that partners are derivatively liable "for the debts and liabilities of the partnership, including its tax liabilities." *Young* v. *Riddell*, 283 F.2d 909, 910 (9th Cir. 1960).

The taxes owed by the partnership were validly assessed under the applicable provisions of federal law, and the existence of a valid partnership debt is therefore not disputed in this case. It is also undisputed that, under state law, the partners are derivatively liable for the valid debts of the partnership. The courts below therefore erred in refusing to enforce the government's claim in this case.

2. The Internal Revenue Code does not require that separate assessments be made for each partner in order to enforce their derivative liability for partnership

taxes under state law. Section 6201(a) of the Code authorizes assessment of "all taxes * * * imposed by this title." 26 U.S.C. 6201(a). The assessment of a tax is a formal bookkeeping notation by which the amount of a tax liability is officially recorded. As the predecessor of the Federal Circuit explained in *Anderson* v. *United States*, 15 F. Supp. 216, 225 (Ct. Cl. 1936), cert. denied, 300 U.S. 675 (1937), it is the "tax" and not the "taxpayer" that is assessed. Once the amount of the "tax" is assessed, no additional or separate "assessment" is required to collect the tax, either from the party who is directly liable for the tax or from other parties who are derivatively liable for it. *Ibid.*

When the amount of the tax is determined and assessed, the time in which a "proceeding in court" may be commenced to collect that tax is extended to "10 years after the assessment of the tax." 26 U.S.C. 6502(a). This statute of limitations applies equally to proceedings against the taxpayers who are directly liable for a tax and to proceedings against persons, such as respondents, whose liability is only derivative. Because the current "proceeding in court" to collect the assessed taxes was "begun * * * within 10 years after the assessment of the tax" (*ibid.*), it is therefore timely as a matter of federal law.

As numerous decisions of this Court and of the other courts of appeals have concluded in a variety of settings, once the tax owed by the directly liable taxpayer has been assessed, no additional or further assessment need be directed to a party whose liability for a tax is only derivative. The court below erred in failing to respect and follow that precedent in this case.

3. The court of appeals also erred in suggesting that California partnership law precludes collection of the tax debts involved in this case. Section 16307(c) of the

California Corporations Code, on which the court relied, specifies that "a judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner." Pet. App. 73a.

Claims are allowable in bankruptcy court, as a matter of federal law, "whether or not" a preexisting judgment has been obtained against the debtor. 11 U.S.C. 101(5)(A). Moreover, bankruptcy court proceedings on disputed claims result in a judgment of that court that is binding on the parties and has res judicata effect. Since, on the merits, the amount and validity of the tax debt are not disputed in this case, any requirement that a judgment be obtained prior to collection of the partnership debt from the partners would be satisfied on remand upon the allowance of the government's meritorious claim.

ARGUMENT

THE UNITED STATES MAY ENFORCE THE DERIVATIVE LIABILITY OF PARTNERS FOR TAX DEBTS OWED BY THEIR PARTNERSHIP WITHOUT MAKING A SEPARATE ASSESSMENT AGAINST EACH OF THE PARTNERS INDIVIDUALLY

The United States made a timely assessment of federal employment tax obligations owed by a partnership. When the partnership failed to pay, the United States sought to enforce these tax liabilities against the partners, who were derivatively liable under state law for all valid debts of the partnership. The court of appeals erred in concluding that, even though the United States has a valid claim against the partnership for unpaid taxes, the United States may not enforce its derivative state-law claim against the partners without first "assessing" the taxes against the partners individually.

A. The Internal Revenue Code Does Not Require That A Partner Be Assessed Individually For Taxes Owed By The Partnership

1. *The Derivative Liability of Partners for the Tax Debts of a Partnership Arises under State Law, not under the Internal Revenue Code.* The court erred initially by misapprehending the essential nature of the government's claim in this case. The government's derivative claim against the partners for the recovery of taxes owed by the partnership is based upon state partnership law. It is brought under the principles of state law that specify that "all *partners are liable* jointly and severally *for all obligations of the partnership*" (Cal. Corp. Code § 16306(a) (West Supp. 2003) (emphasis added)).[4] While federal law creates the debt of the partnership for these employment taxes (see pages 2-3, *supra*), it is state law that makes the partners derivatively liable for that debt.

Under state partnership principles, it is well established that general partners are "personally liable for the debts and liabilities of the partnership, including its tax liability." *Young* v. *Riddell*, 283 F.2d 909, 910 (9th

[4] This provision is contained in Section 306(a) of the Uniform Partnership Act (1997), which has been adopted by 31 States, the District of Columbia and the Virgin Islands. 6 U.L.A. 117 cmts. 1-2 (2001). California enacted this provision in 1996, 1996 Cal. Stat. ch. 1003 (A.B. 583), § 2, and it was made effective January 1, 1997. As of January 1, 1999, this provision became applicable to "all partnerships," regardless when formed. Cal. Corp. Code § 16111(b). Prior California law had also long provided that general partners are jointly and severally liable for the federal tax debts of their partnership. Cal. Corp. Code § 15103 (repealed); Cal. Corp. Code § 15105 (repealed). *Young* v. *Riddell*, 60-1 U.S. Tax Cas. (CCH) ¶ 9381, at 76,054 (S.D. Cal. 1959), aff'd, 283 F.2d 909 (9th Cir. 1960); see *Danning* v. *United States*, 532 F.2d 725, 726 (9th Cir. 1976); *In re Crockett*, 150 F. Supp. 352, 354 (N.D. Cal. 1957).

Cir. 1960). Accordingly, when (as in this case) a valid "obligation of the partnership" exists under federal law, that lawful debt of *the partnership* may be enforced directly against *the partners* under state law. See *United States* v. *Papandon*, 331 F.3d 52, 55 (2d Cir. 2003) ("state law determines a partner's liability for partnership obligations"); *Remington* v. *United States*, 210 F.3d 281, 283 (5th Cir. 2000) (under state law, "the IRS is entitled to collect the trust fund tax liability, indisputably a partnership debt, from any one of the general partners," because "[t]he partnership is the primary obligor and its partners are jointly and severally liable on its debts"); *Ballard* v. *United States*, 17 F.3d 116, 118 (5th Cir. 1994) ("it is state law that determines when a partner is liable for the obligations—including employment taxes—of his partnership"); *United States* v. *Hays*, 877 F.2d 843, 844 n.3 (10th Cir. 1989) ("the liability of a general partner for the tax obligations of the partnership is determined by state law rather than federal law"); *Calvey* v. *United States*, 448 F.2d 177, 180 (6th Cir. 1971) (same).

In the present case, the uncontroverted record establishes (i) that timely assessments of the partnership's tax liabilities were made within the three-year period allowed by 26 U.S.C. 6501(a), (ii) that those timely assessments extended the time for collection of those tax liabilities for an additional ten-year period (26 U.S.C. 6502(a)), and (iii) that this ten-year period has not yet expired. See Pet. App. 16a. The existence of the partnership debt, and the liability of the partners for that debt under state law, are thus both undisputed in this case. See *ibid.* See also *Tony Thornton Auction Services, Inc.* v. *United States*, 791 F.2d 635, 638 (8th Cir. 1986) ("the individual partners" are "jointly and

severally liable for the taxes validly assessed against the partnership").

2. *No Assessment of Partners is Required to Permit Collection of Their Derivative Liability for Taxes Owed by the Partnership.* Without directly challenging the established rule that general partners are liable for the valid debts of their partnership under state law, the court of appeals concluded that these taxes could not be collected from the partners in this case because they had been assessed by the IRS only against the partnership and not directly against the partners. Pet. App. 7a-8a. The court stated that, because no assessment was made against the partners "within the three-year period provided under §6501(a), [that statute] bars [the government] from collecting the unpaid debts of the Partnership directly from [the partners]." Pet. App. 8a.[5] This conclusion of the court of appeals is based on

[5] The period of limitations for the United States to enforce a claim held "in its governmental capacity" is determined by federal, rather than state, law. *United States* v. *Summerlin*, 310 U.S. 414, 417 (1940). See *United States* v. *John Hancock Mut. Life Ins. Co.*, 364 U.S. 301, 308 (1960)("the United States is not subject to local statutes of limitation"). In *United States* v. *California*, 507 U.S. 746, 757 (1993), this Court stated that the cases applying this rule to state-law causes of action have involved situations in which "either the right at issue was obtained by the Government through, or created by, a federal statute" or "a federal statute provided the statute of limitations." In the present case, (i) the government plainly proceeds in its sovereign capacity in seeking to collect unpaid federal tax obligations; (ii) those underlying obligations are "created by" federal statute; and (iii) 26 U.S.C. 6502 provides the period of limitation for the collection of taxes either from persons directly or derivatively liable for them. See *United States* v. *Updike*, 281 U.S. 489, 494 (1930) ("[t]he aim in the one case, as in the other, is to enforce a tax liability"). Respondents acknowledge that Section 6501 and Section 6502 govern this case.

a fundamental misunderstanding of the function and nature of an assessment under the Internal Revenue Code.

a. The Internal Revenue Code does not require that separate assessments be made for each partner in order to enforce their derivative liability for partnership taxes under state law. An assessment is merely a formal record of the amount of tax that is due. Once the amount of a tax is determined and recorded in an assessment, the Commissioner may enforce that liability against *any* party that is directly or derivatively liable for it.

Section 6201(a) of the Internal Revenue Code authorizes the Secretary of the Treasury "to make * * * assessments of all taxes * * * imposed by this title." 26 U.S.C. 6201(a). An assessment is made "by recording the liability of the taxpayer in the office of the Secretary [of the Treasury] in accordance with rules or regulations prescribed by the Secretary." 26 U.S.C. 6203. Section 301.6203-1 of the Treasury Regulations states that an assessment is made by the "assessment officer signing the summary record of assessment" which, "through supporting records," provides "identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment." 26 C.F.R. 301.6203-1.[6] The

They contend, for the reasons adopted by the courts below, that the time provided by these governing federal statutes has expired.

[6] The "summary record of assessment" described in this regulation has historically been made on Form 23C and, more recently, on a similar computer-generated form entitled RACS Report 006. See *March* v. *IRS*, 335 F.3d 1186, 1188 (10th Cir. 2003); *Huff* v. *United States*, 10 F.3d 1440, 1446 & n.5 (9th Cir. 1993). Each "summary record of assessment" aggregates *all* of the taxes, penalties and interest assessed for income, excise, estate, gift and employ-

assessment of a tax is thus "essentially a bookkeeping notation" that serves as a formal record of the amount of the tax liability. *Laing* v. *United States*, 423 U.S. 161, 170 n.13 (1976); *United States* v. *Dixieline Financial, Inc.*, 594 F.2d 1311, 1312 (9th Cir. 1979). And, "through supporting records" that are not part of the assessment document itself, the name and address of the taxpayer who is directly liable for the taxes is also identified. 26 C.F.R. 301.6203-1.

As the predecessor of the Federal Circuit explained in its early decision in *Anderson* v. *United States*, 15 F. Supp. 216, 225 (Ct. Cl. 1936) (emphasis added), cert. denied, 300 U.S. 675 (1937):

> *The assessment contemplated by and referred to in the statute is the assessment by the Commissioner of the tax and the Commissioner's assessment list, which the Commissioner actually signs when he makes an assessment of the tax, does not contain the names of any taxpayers but contains only the amounts and the total tax* as "additional assessments made by the Commissioner." * * * Attached to this assessment list of the Commissioner are separate sheets for use by the collector in keeping his record of collections, credits, and balances due on which is written the name of the person or corporation in respect of whose taxes the amount stated on the Commissioner's assessment list has been assessed.

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ment taxes at a particular service center on a particular date. The "summary record of assessment" does not identify any particular taxpayer or any particular tax period. Any identifying information is set forth in the "supporting records" that are not part of the assessment document itself. 26 C.F.R. 301.6203-1.

The designation on supplementary sheets "of the person in respect of whose income a tax was assessed or the person from whom collection should be made is for the information and guidance of the collector." 15 F. Supp. at 228. The Commissioner's practice in this regard has remained consistent in the ensuing decades since *Anderson* was decided. See note 6, *supra*.

In the present case, it is undisputed that a timely assessment of the taxes owed by the partnership was made. Pet. App. 5a. No other or further "assessment" of these taxes is contemplated, or required, by this statute.

b. When (as in the present case) the IRS makes a timely assessment of a tax, two important consequences ensue.[7] First, after a tax is assessed, the IRS may employ administrative enforcement methods such as tax liens and levies to collect the outstanding tax. 26 U.S.C. 6321-6327, 6331-6344.[8] Second, when a timely

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[7] Even without any assessment of a tax, the United States may bring suit against any party liable for the tax to reduce the unassessed liability to judgment. Section 6501(a) of the Code makes this clear by specifying that "no proceeding in court *without assessment*" for the collection of any tax "shall be begun after the expiration of" three years from the date the applicable tax return was filed. 26 U.S.C. 6501(a). Under this statute, a collection suit may be begun either with or "without assessment" prior to the expiration of this three-year period. *Goldston* v. *United States*, 104 F.3d 1198, 1201 (10th Cir. 1997) (even in "the absence of an assessment" the government "may still file a civil action" or "a proof of claim in a bankruptcy proceeding" to collect the tax during this initial three-year period).

[8] The federal tax lien arises only "at the time the assessment is made." 26 U.S.C. 6322. In addition, before a tax lien arises or seizure and sale of property by levy may occur, the Secretary is to give notice of the assessment to, and make demand for payment upon, "each person liable for the unpaid tax" within 60 days after

assessment is made, the time within which the IRS may collect the tax either administratively *or* by a "proceeding in court" is extended to 10 years after the date of assessment. 26 U.S.C. 6502(a).

In the present case, the IRS properly made a timely assessment of the taxes owed by the partnership. The federal taxes at issue in this case are imposed directly on the "employer." 26 U.S.C. 3102(b) ("[e]very employer" required by 26 U.S.C. 3102(a) to deduct the employees' share of FICA taxes imposed by 26 U.S.C. 3101 "shall be liable for the payment of such tax"); 26 U.S.C. 3111(a) (the employer's share of FICA taxes is imposed on "every employer * * * with respect to having individuals in his employ"); 26 U.S.C. 3301 (same re FUTA taxes); 26 U.S.C. 3403 ("the employer" is liable for the income taxes withheld from employees' wages). When the partnership paid wages to its employees, it thereby created employment tax liabilities for itself, as the "employer," under federal law. See *Otte* v. *United States*, 419 U.S. 43, 51 (1974); *In re Armadillo Corp.*, 410 F. Supp. 407, 410 (D. Colo. 1976), aff'd, 561 F.2d 1382 (10th Cir. 1977).[9]

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making the assessment. 26 U.S.C. 6303(a), 6321, 6331(a). Notice and demand for payment are not, however, preconditions to the filing of a judicial collection suit. *United States* v. *Chila*, 871 F.2d 1015, 1018-1019 (11th Cir. 1989); *United States* v. *Berman*, 825 F.2d 1053, 1060 (6th Cir. 1987); *United States* v. *Hunter Eng'rs & Constructors, Inc.*, 789 F.2d 1436, 1441 (9th Cir. 1986), cert. denied, 479 U.S. 1063 (1987). Nor, as the plain text of the statute makes clear, is such notice and demand a condition for the extension of the period of limitations for such a suit under Section 6502(a), 26 U.S.C. 6502(a). See *Blackston* v. *United States*, 778 F. Supp. 244, 248 (D. Md. 1991).

[9] For purposes of income tax withholding, the term "employer" is generally defined as "the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person." 26 U.S.C. 3401(d). The cited cases applied the same definition for purposes of FICA and FUTA taxes under 26 U.S.C. 3102, 3111, and 3301.

The government made a timely assessment of those taxes within the three-year period allowed by Section 6501(a) of the Internal Revenue Code, 26 U.S.C. 6501(a). Pet. App. 5a. And, under Section 6502(a), that timely assessment of the tax extended for ten years the period in which a judicial action could be commenced to collect that liability (26 U.S.C. 6502(a)):

> Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court * * * begun * * * within 10 years after the assessment of the tax.

This extension of the collection period applies without regard to the identity of the party against whom the action is commenced. It applies equally to a proceeding against a taxpayer who is directly liable for a tax and to a proceeding against a person who is derivatively liable for it. Because the current "proceeding in court" to collect the assessed taxes was "begun * * * within 10 years after the assessment of the tax" (*ibid.*), it is timely as a matter of federal law under these provisions.

c. The court of appeals incorrectly rejected this straightforward application of these statutes on the ground that they apply only when the assessment is made "against the taxpayer" from whom the taxes are being collected. Pet. App. 6a. The court failed to understand that, when a valid assessment is made of the tax owed by the person directly or primarily liable,

no further or separate assessment is required before a collection action may proceed against individuals who are derivatively liable for the tax.

The Code's text itself reveals the error of the court of appeals' interpretation. Section 6501(a) provides that "*the amount of any tax* imposed by this title *shall be assessed* within 3 years after the return was filed," 26 U.S.C. 6501(a) (emphasis added), thus making clear that it is the *amount of the tax*, not the taxpayer or person derivatively liable, that must be assessed. Similarly, Section 6502(a) provides that, "[w]here *the assessment of any tax*" has been timely made, suit may be brought to collect "such tax" "within 10 years after *the assessment of the tax*." 26 U.S.C. 6502(a) (emphases added). This statutory language confirms that Congress contemplated a single "assessment of any tax," and that such assessment would trigger the 10-year period of Section 6502(a)(1) without regard to the identity of the person or persons ultimately found liable to pay the tax. Nothing in the text of these provisions provides any support for the court of appeals' contrary view that "individual assessments" against each potentially liable person are required before Section 6502(a)(1) becomes applicable.

This reading of the statutory text is confirmed by a long-established body of case law holding in a variety of contexts that tax collection actions may proceed against derivatively liable persons in the absence of a separate, individual assessment naming those persons. In *Leighton* v. *United States*, 289 U.S. 506 (1933), for example, this Court addressed an analogous issue involving the derivative liability of transferees of corporate assets for taxes owed by the corporation. The Court expressly rejected the transferees' argument that the statute "require[d] an assessment against them" as a

prerequisite to the collection action. *Id.* at 509. Instead, the Court held that the right of the United States to enforce this derivative liability is based on the assessment against the primarily liable corporation and exists even "without assessment" of the tax against the parties whose liability was only derivative. *Id.* at 508-509. In *United States* v. *Updike*, 281 U.S. 489, 494 (1930), the Court similarly concluded that, because the tax imposed on the corporation "is the basis of the liability" of the transferee, the same limitations period that applies in a suit to collect from the directly liable corporation also applies in a suit against the derivatively liable transferee.

The Seventh Circuit relied upon this Court's decision in *Updike* in *United States* v. *Wright*, 57 F.3d 561 (1995). In *Wright*, as in the present case, the court addressed the statute of limitations that governs an action to collect a partner's derivative state-law liability for unpaid federal employment taxes incurred by a partnership. The question in that case, as in the present one, was "whether, if a suit against the taxpayer would be timely, then suit is also timely against persons derivatively liable." 57 F.3d at 564.[10] The Seventh

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[10] The court below erred in this case in stating that "*Wright* is distinguishable because * * * the IRS had assessed both the partnership * * * and the individual partners." Pet. App. 13a (emphasis omitted). The government had maintained in *Wright* that "the assessments were levied against the partnership only and not against any of the partners individually." *United States* v. *Wright*, 868 F. Supp. 1070, 1071 n.1 (S.D. Ind. 1994). The district court in *Wright* "made clear" that, although it appeared that an assessment may have been entered against the partners as well as against the partnership, that question was "not material to the resolution" of the case. *Ibid.* The Seventh Circuit also did not suggest that the existence of assessments against the partners would have been relevant in *Wright*. See 57 F.3d at 562-563. To

Circuit explained in *Wright* that, under the reasoning of this Court in *Updike*, "the governing principle is all-for-one, one-for-all." 57 F.3d at 563. The court concluded that (*id.* at 564):

> suits against persons derivatively liable for taxes are timely, or not, according to the rules for timeliness of suits against taxpayers. It is hard to escape that conclusion, for both [26 U.S.C.] § 6502 and § 6503 establish rules for suing taxpayers; they do not set up separate periods for persons secondarily liable. Their structure presumes that there is only one period per tax *debt*, no matter how many different persons may be liable on the debt.

Prior to the decision in this case, this rule had long been followed in the lower courts. For example, more than 65 years ago, the predecessor of the Federal Circuit explained that it is incorrect to assume, as the court of appeals did here (Pet. App. 6a-8a), "that the Commissioner of Internal Revenue assesses the taxpayer instead of assessing the tax." *Anderson* v. *United States*, 15 F. Supp. 216, 225 (Ct. Cl. 1936).[11] Because it is the "tax," and not the "taxpayer," that is assessed, the court in *Anderson* held that a separate assessment is not required to collect a tax from a party who is derivatively liable for it. *Ibid.* (estate executor derivatively liable without assessment for taxes owed by decedent). See also page 14, *supra*. As the court

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the contrary, in a holding that directly conflicts with the decision in this case, the court concluded that "suits against persons derivatively liable for taxes are timely, or not, according to the rules for timeliness of suits against taxpayers." *Id.* at 564.

[11] As the predecessor of the Federal Circuit, the decisions of the Court of Claims are binding precedent in that circuit. *South Corp.* v. *United States*, 690 F.2d 13678, 1370 (Fed. Cir. 1982).

explained in a companion case in *Anderson*, so long as the assessment of the "tax" was timely, "the Commissioner had six [now ten] years thereafter within which to make collection" from any person who may be liable for it. *Id.* at 229.

Numerous other courts have adopted and applied this same basic rule in various contexts. As these courts have recognized, a "[f]urther independent assessment [against the party derivatively liable for the tax] would accomplish nothing." *United States* v. *Dixieline Financial, Inc.*, 594 F.2d 1311, 1312 (9th Cir. 1979). See also *United States* v. *Walker*, 217 F. Supp. 888, 890 (W.D.S.C. 1963) (for a collection action to proceed against a derivatively liable party, "[t]he Commissioner is required to assess the tax * * * rather than assess the taxpayer."). For example, in *Payne* v. *United States*, 247 F.2d 481, 484, 489 (8th Cir. 1957), cert. denied, 355 U.S. 923 (1958), the court held that the limitations period under Section 6502(a) for a suit claiming derivative liability of a transferee extended for six [now ten] years after assessment of the tax even though "no assessment * * * had ever been made" against the transferee.

The Tenth Circuit recently reached this same conclusion in *United States* v. *Botefuhr*, 309 F.3d 1263 (2002). In that case, the government sought to collect a gift tax from the donee, who was derivatively liable for the tax only "to the extent of the value of such gift" (26 U.S.C. 6324(b)).[12] The court rejected the argument of the donee that he was relieved of liability because an

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[12] The Internal Revenue Code imposes primary liability for the federal gift tax upon the donor. 26 U.S.C. 2502(c). If the donor fails to pay the tax, however, the donee is personally liable for the tax to the extent of the value of the gift. 26 U.S.C. 6324(b).

assessment had not been made directly against him. The court explained that a timely "assessment" of the *tax* owed by the donor (who was primarily liable) had been made and that, since "the suit would be timely brought against the donor under these provisions, it will be considered timely against the donee or transferee" even though no separate assessment had been made against him. 309 F.3d at 1277-1278. "[B]ecause the IRS is acting within the time period in which it could act against the donor," the court said, "its case against [the derivatively liable] donee is timely." *Id.* at 1278.

d. Accordingly, prior to the decision in this case, the decisions of this Court and other courts of appeals had consistently held that an assessment of a party whose liability for a tax is only derivative is not required to extend the statute of limitations provided by Section 6502(a). Under the holdings of these numerous, consistent decisions, the government's collection action in the present case is timely because it was brought "within 10 years after the assessment of the tax" owed by the partnership. 26 U.S.C. 6502(a)(1). The court below erred by failing to honor and follow this substantial body of precedent in this case.

The erroneous conclusion of the Ninth Circuit in this case is also refuted by other decisions of that same circuit. For example, the Ninth Circuit has held in analogous situations that, when the IRS makes a timely assessment of employment taxes against an employer, that assessment is sufficient by itself to extend the time for bringing suit to recover the derivative liability of a lender under Section 3505 of the Code. The lender's derivative liability for employment taxes closely parallels the derivative liability of a partner under state law. Under Section 3505(a), a lender that pays wages directly to the employees of another employer is liable itself for the amount of taxes required to be deducted and withheld from the wages. 26 U.S.C. 3505(a). Under Section 3505(b), a lender is also liable if it supplies funds to an employer for the specific purpose of paying wages "with actual notice or knowledge * * * that such employer does not intend to or will not be able to make timely payment" of the requisite withholding taxes. 26 U.S.C. 3505(b). The lender's liability, like the partner's liability for partnership employment taxes, is derivative because it arises when the employer fails to pay the taxes imposed. In decisions that were not explained or even discussed by the panel in this case, the Ninth Circuit held that an assessment of liability against the employer is sufficient to extend the limitations period for filing suit against the lender on its derivative liability for that tax. *United States* v. *Dixieline Financial, Inc.*, 594 F.2d 1311 (9th Cir. 1979). The court stated that "the assessment of the tax against * * * the employer * * * met the requirements of § 6501(a)" and that "[f]urther independent assessment" against the derivatively liable lender was unnecessary and "would accomplish nothing." 594 F.2d at 1312-1313.[13] Accord, *United States* v. *First Nat'l Bank of Circle*, 652 F.2d 882, 889 (9th Cir. 1981).

In upholding that same conclusion in *United States* v. *Hunter Engineers & Constructors, Inc.*, 789 F.2d 1436, 1441 (1986), cert. denied, 479 U.S. 1063 (1987), the Ninth Circuit noted that a shorter limitations period for

[13] In fact, in *Jersey Shore State Bank* v. *United States*, 479 U.S. 442, 447 (1987), the Court observed that a lender's liability under Section 3505 cannot be assessed: "[T]he legislative history of § 3505 makes clear that the Government may forcibly collect against a lender only by filing a civil suit."

the derivatively liable lenders than for the employers would be unwise, for it would force the government to file an action against the lenders within three years after the return was filed even if collection efforts against the employer remained ongoing. *Ibid.* The court emphasized that the parties whose liability was only derivative "would suffer if the government was forced to look to them for collection sooner than against employers." *Ibid.*[14]

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[14] The court below also erred in suggesting that one of its own "precedents weigh against the IRS's position" in this case. Pet. App. 8a-11a. The case on which the court erroneously relied was *Young* v. *Riddell*, 283 F.2d 909 (9th Cir. 1960), aff'g 60-1 U.S. Tax Cas. (CCH) ¶ 9381 (S.D. Cal. 1959). In that case, the district court stated that, "[w]here taxes are assessed against a partnership and under state law each member of the partnership is jointly and severally liable for the debts of the partnership, *it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability*; their liability arises as a matter of state law." 60-1 U.S. Tax Cas. (CCH) at 76,054 (emphasis added). The Ninth Circuit affirmed that decision, noting that the individual partner was "personally liable for the debts and liabilities of the partnership, including its tax liability" and would remain so "until the taxes were paid or otherwise discharged as to [the partner]." 283 F.2d at 910-911. This holding in *Young* is plainly consistent with the established rule that taxes may be collected from parties who are derivatively liable without need for separate and additional assessments issued to them directly.

The court of appeals similarly erred in seeking to rely (Pet. App. 11a-12a) on what it acknowledged was "dictum" in *United States* v. *Coson*, 286 F.2d 453 (9th Cir. 1961). As the court explained in *Marvel* v. *United States*, 719 F.2d 1507, 1514 (10th Cir. 1983), "*Coson* deal[s] with the question of whether a federal tax lien was properly perfected. [It does] not stand for the principle that an inadequate notice [of assessment and demand for payment under 26 U.S.C. 6323] bars the Government from obtaining a judgment for tax liabilities due and owing by taxpayers, whether or not named in the notice and demand for payment."

B. California Partnership Law Does Not Preclude Collection Of The Partnership Tax Debts Involved In This Case

The court of appeals acknowledged that, "under California law, partners are 'personally liable for the debts and liabilities of the partnership, including its tax liability.'" Pet. App. 14a (citing *Young* v. *Riddell*, 283 F.2d at 909). The court stated, however, that state law permits "a creditor [to] collect a debt for which the partner is jointly and severally liable only by first obtaining a judgment against the partner." Pet. App. 16a (citing Cal. Corp. Code § 16307(c)). The court concluded that, since "[t]he IRS has obtained no judgment against [respondents,]" and since "[t]he time for doing so has expired," the partners may not now be held liable for the tax debts of the partnership. *Ibid.*[15]

The court erred in concluding that state partnership law bars the recovery sought in this case. Section 16307(c) of the California Corporations Code, on which the court relied, specifies that "[a] judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner." Pet. App. 73a. Nothing in that statute addresses or purports to govern the question of federal tax administration presented in this case.

As the decisions of the Federal Circuit, Seventh Circuit, Eighth Circuit and Tenth Circuit described above all make clear, the timely assessment of an

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[15] Although the court presented this conclusion as a distinct alternative to its holding that the timely assessment of the partnership's employment tax liability did not extend the time for collection of that liability directly from the partners under 26 U.S.C. 6501(a), the court's state-law analysis plainly rests on that same reasoning. See Pet. App. 6a, 14a-17a.

employment tax liability permits an action to collect that tax against any primarily or derivatively liable party "by a proceeding in court * * * begun * * * within 10 years after the assessment of the tax." 26 U.S.C. 6502(a)(1). Because the government's tax collection action in these bankruptcy proceedings was commenced "within 10 years after the assessment of the tax" (*ibid.*), it is timely.

We do not dispute that, if the government brought suit against the partnership to recover its unpaid taxes, a judgment solely against the partnership would not permit the IRS immediately to look to the partners' assets for collection of the judgment under Cal. Corp. Code § 16307(c). This case, however, is obviously different. This case was brought by the United States in bankruptcy court to enforce the derivative liability of the individual partners for the tax debt of their partnership. Because respondents had filed for bankruptcy, the United States was barred by the automatic stay from bringing suit outside of bankruptcy court to enforce this derivative liability. 11 U.S.C. 362(a)(1). When the government asserted its claims in the bankruptcy proceedings (11 U.S.C. 501(a)), respondents exercised their right to object to the allowance of the claims (11 U.S.C. 502(a)). After such objections were filed, the bankruptcy court was to determine the validity and amount of the government's claim "after notice and a hearing." 11 U.S.C. 502(b).[16] The adjudication and determination of a disputed claim in the bank-

[16] The Bankruptcy Code does not require a preexisting judgment as a prerequisite for allowance of a claim in bankruptcy. Instead, it requires only a "right to payment, *whether or not such right is reduced to judgment*, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. 101(5)(A) (emphasis added).

ruptcy case results in a judgment that has res judicata effect. *Katchen* v. *Landy*, 382 U.S. 323, 334 (1966) (citing cases).

Such bankruptcy court proceedings on a disputed claim obviously comport with any requirement that there be a "judgment against a partner" before the liability of a partnership may be collected "from a partner's assets" (Cal. Corp. Code § 16307(c)). The order allowing a disputed claim in bankruptcy court is a judgment with res judicata effect that is enforceable against the debtors and their property. Since, on the merits, the amount and validity of the tax debt are not disputed in this case, any requirement that a judgment be obtained prior to collection of the partnership debt from the partners would thus be satisfied on remand upon the allowance of the government's meritorious claim. In any event, such a claim is allowable in bankruptcy court as a matter of federal law "whether or not" a preexisting judgment had been obtained. 11 U.S.C. 101(5)(A). See note 16, *supra*.

C. The Decision Of The Court Of Appeals Would Impede And Burden Routine Enforcement Of The Tax Laws

The decision of the court of appeals would create severe and impracticable burdens for routine enforcement of the tax laws. We are advised by the Internal Revenue Service that there are currently outstanding partnership employment tax liabilities in excess of $10 billion that have been timely assessed but for which separate assessments have not been made against partners individually. The decision of the court of appeals would routinely bar collection of those liabilities from individual partners in cases in which the ordinary three-year period for assessment of taxes in 26 U.S.C. 6501(a) has expired.

It is undisputed that general partners are jointly and severally liable for all outstanding debts of the partnership under applicable principles of state law. See note 4, *supra*. Until now the IRS has typically pursued collection of partnership tax obligations from the partnerships before commencing litigation with partners to satisfy outstanding tax obligations. Under the abbreviated limitations period that would result from the decision in this case, however, the government would be forced to bring collection suits against partners within the three-year period prescribed in Section 6501(a), even though parallel efforts against the partnership may remain ongoing. A requirement that such duplicative proceedings be pursued would be burdensome for partners as well as for the government, because it would subject partners to the necessity of litigation over matters that the partnership itself should routinely resolve. As the Ninth Circuit pointed out in a related context in *United States* v. *Hunter Engineers & Constructors, Inc.*, 789 F.2d at 1441, persons whose liability for taxes is only derivative "would suffer" severely if the government were forced to pursue such premature and duplicative collection actions. In short, the "doctrine [for which respondents contend] would be attended in practice with great inconvenience, and would seldom lead to any good. Fortunately, the law is not so unreasonable." *The Nitro-glycerine Case*, 82 U.S. (15 Wall.) 524, 535 (1872).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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UNITED STATES,

Petitioner,

v.

ABEL COSMO GALLETTI and SARAH GALLETTI;
FRANCESCO BRIGUGLIO and ANGELA BRIGUGLIO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

What steps must the Internal Revenue Service take to collect a tax liability owed by a general partnership from a general partner of that partnership?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

STATEMENT 1

SUMMARY OF ARGUMENT 2

ARGUMENT 7

THE INDIVIDUAL PARTNERS OF A GENERAL PARTNERSHIP ARE PRIMARILY LIABLE UNDER STATE LAW AND THEREFORE ARE TAXPAYERS WHO MUST EITHER BE SUED OR ASSESSED WITHIN THREE YEARS 7

A. California Law Makes Partners Primarily Liable for Partnership Debts Because of Joint and Several Liability 8

B. Partner Liability Is Not Secondary ("Derivative") Liability 11

1. Secondary Liability Can Be Imposed By Federal Law 12

a. Lender Liability (I.R.C. §3505) 12

b. Responsible Person Liability (I.R.C. § 6672) 13

c. Transferee Liability 14

2. Secondary Liability Can Be Imposed By State Law 16

C. Partners Are Taxpayers under the IRC and must Be Assessed or Sued for the Partnership Tax Debt 19

1. The Respondents Are Liable for Partnership Tax Debt, and the Debt Is Unenforceable Due to the Expiration of the Limitations Period of I.R.C.§ 6501(a) 19

2. Other Circuit Decisions Are Not in Conflict with the Ninth Circuit's Holding in this Case Because They Did Not Decide the Same Issue 25

D. If Partners Are Not Taxpayers, Their Liability Arises Only under State Law and Enforcement Is Governed by State Limitation Periods 30

E. The Administrative Practices of the IRS Evidenced by its Guidelines and the Cases it Cites Contradicts the IRS's Position in this Case 34

F. Treating General Partners as Taxpayers for Collection of Partnership Tax Debt Will Avoid the Need to Address Significant Statutory and Constitutional Issues Created by Current IRS Collection

Practice 38

1. IRS's Current Collection Practices 38

2. Statutory Issues Created by IRS's Current Collection Practices 39

3. Constitutional Issues Created by IRS's Current Collection Practices 42

CONCLUSION 46

TABLE OF AUTHORITIES

CASES

ADAMS V. UNITED STATES, 328 F. SUPP.228 (D.NEB. 1971) 39

ADAMSON V. CALIFORNIA, 332 U.S. 46, 61 (1947) 42

ALLGEIER, MARTIN & ASSOC. V. ASHMORE, 508 S.W.2D 524 (MO. 1974) 8

ANDERSON V. UNITED STATES, 15 F. SUPP. 216 (CT. CL. 1936) 37

ARMSTRONG V. MANZO, 380 U.S. 545, 552 (1965) 43

B.K. BLOCH & CO., 52 P.770 (UT. 1898) 9

BALDWIN V. HALE, 1 WALL. 223 (1864) 42

BALLARD V. UNITED STATES, 17 F.3D 116 (5TH CIR, 1994) 25

BENNETT V. OBERLIN BAKERIES CO., 1 OHIO LAW ABS 870 (1923) 9

BLACKSTON V. UNITED STATES, 778 F. SUPP. 244 (D. MD. 1991) 21, 40

BODDIE V. CONNECTICUT, 401 U.S. 371, 377-378 (1971) 43

BRESSON V. COMMISSIONER, 213 F.3D 1173 (9TH CIR. 2000) 18

BULL V. UNITED STATES, 295 U.S. 247, 259 (1935) 45

CALVEY V. UNITED STATES, 448 F.2D 177 (6TH CIR. 1971) 25

CH2M HILL, INC. V. BLACK & VEATCH, 557 N.W.2D 829 (WIS. 1996) 9

COMMISSIONER V. STERN, 357 U.S. 39 (1958) ..... *passim*

COOL FUEL, INC. V. CONNETT, 685 F.2D 309 (9TH CIR. 1982) 41

CURNANE V. CURNANE, 27 N.E.2D 714 (MASS. 1940), ... 8

DWIGGINS V. PARKWAY BUS CO., 230 N.C. 234 (1949) 8

EL PASO REFINING, INC. V. INTERNAL REVENUE SERVICE, 205 B.R.497 (W.D. TEX. 1996) 42

G.M. LEASING CORP. V. UNITED STATES, 429 U.S. 338, 350-351 (1977) 40

HOVEY V. ELLIOTT, 167 U.S. 409 (1897) 42

IN RE ROBBY'S PANCAKE HOUSE, INC., 24 B.R. 989 (BANKR. E. D. TENN. 1982) 39

JERSEY SHORE STATE BANK V. UNITED STATES, 479 U.S. 442 (1987) 12, 13, 21

JONES V. UNITED STATES, 60 F.3D 584 (9TH CIR. 1995) 14

LAUCKNER V. UNITED STATES, 68 F.3D 69 (3RD CIR. 1995) 14

MANSOUR V. MASSEY, 287 S.C. 176 (1985) 9

MATTHEWS V. ELDRIDGE, 424 U.S. 319, 333 (1976) 44

MENNONITE BOARD OF MISSIONS V. ADAMS, 462 U.S. 791 (1983) 45

MULLANE V. CENTRAL HANOVER TR. CO., 339 U.S. 306 (1950) 43

NISENZON V. SANDOWSKI, 689 A.2D 1037 (R.I. 1997) 9

PHILLIPS V. COMM. INTERNAL REVENUE, 283 U.S. 589 43

REMINGTON V. UNITED STATES, 210 F.3D 281 (5TH CIR. 2000) 25

RESYN CORP. V. UNITED STATES, 945 F.2D 1279 (3RD CIR, 1991) 21, 40

RIPLEY V. COMMISSIONER, 102 T.C. 654 (1994) 15

ROSENBLUM V. JUDSON ENG'G CORP., 99 N.H. 267 (1954) 8

SLODOV V. UNITED STATES, 436 U.S. 238 (1978) 13, 14

TAX REVIEW BOARD V. D. H. SHAPIRO CO., 409 PA. 253 (1962) 9

TONY THORNTON AUCTION SERVICES, INC. V. UNITED STATES, 791 F.2D 635 (8TH CIR. 1986) 25

UNDERWOOD V. UNITED STATES, 118 F. 2D 760 (5TH CIR. 1941) 39

UNITED STATES V. BERMAN, 825 F.2D 1053 (6TH CIR. 1987) 21, 27, 39

UNITED STATES V. BOTEFUHR, 309 F.3D 1263 (10TH CIR. 2002) 15, 30

UNITED STATES V. CALIFORNIA, 507 U.S. 746 (1993) 32, 47

UNITED STATES V. CHILA, 871 F.2D 101 (11TH CIR. 1989) 21, 39, 40

UNITED STATES V. DIXIELINE FINANCIAL, INC., 594 F.2D 1311 (9TH CIR. 1979) 31

UNITED STATES V. ENERGY RESOURCES CO., INC., 495 U.S. 545 (1990) 14

UNITED STATES V. ESTATE OF ROMANI, 523 U.S. 517 (1998) 16

UNITED STATES V. FIRST NATIONAL BANK OF CIRCLE, 652 F.2D 882 (9TH CIR. 1981) 31

UNITED STATES V. HAYS, 877 F.2D 843 (10TH CIR, 1989) 25

UNITED STATES V. HUNTER ENGINEERS & CONSTUCTORS, INC., 789 F.2D 1436 (9TH CIR. 1986), CERT. DENIED, 479 U.S. 1063 (1987) 31

UNITED STATES V. JAMES DANIEL GOOD REAL PROPERTY, 510 U.S. 43, 53 (1993) 43

UNITED STATES V. JOHN HANCOCK MUT. LIFE INS. CO., 364 U.S. 301 308 (1960) 32

UNITED STATES V. PAPANDON, 331 F.3D 52 (2ND CIR. 2003) 25, 26

UNITED STATES V. RUSSELL, 461 F.2D 605 (10TH CIR. 1972) 15

UNITED STATES V. SCHNEIDER, 92-2 U.S.T.C. ¶60,119 (D.N.D. 1992) 15

UNITED STATES V. SCOTT, 167 F.2D 301 (8TH CIR. 1948) 34

UNITED STATES V. SUMMERLIN, 310 U.S. 414, 416 (1940) 32

UNITED STATES V. UPDIKE, 281 U.S. 489 (1930) 28, 33

UNITED STATES V. VELLALOS, 780 F. SUPP 705 (D. HAWAII 1992), APPEAL DISMISSED, 990 F.2D 1265 (9TH CIR. 1993)(UNPUBLISHED TABLE DECISION) 18

UNITED STATES V. WILLIAMS, 514 U.S. 527 (1995) 19

UNITED STATES V. WRIGHT, 57 F.3D 561 (7TH CIR. 1995) 27, 28, 34, 47

UNITED STATES V. WRIGHT, 868 F. SUPP. 1070 (S.D. IND. 1994) 27

WALLIN V. COMMISSIONER, 774 F.2D 674 (9TH CIR. 1984) 41

WEBBER V. RICHTER, 187 N.W. 528 (MICH. 1922) 8

WINDSOR V. MCVEIGH, 93 U.S. 274,277 (1876) 42

WOLFE V. UNITED STATES, 798 F.2D 1241 (9TH CIR. 1986) 40

YOUNG V. RIDDELL, 283 F.2D 909 (9TH CIR. 1960) 25

STATUTES, RULES AND REGULATIONS

11 U.S.C. § 502(B)(1) 11

26 C.F.R. §301.6203-1 20

28 U.S.C. §2410(C) 32

31 U.S.C. §3713 16

805 ILL. COMP. STAT. 206/307(C)(2003) 8

ALA. CODE §10-8A-307(C)(2003) 8

ALASKA STAT. §32.06.307(C) 8

ARIZ. REV. STAT. §29-1027(C)(2003) 8

ARK. CODE ANN. §4-46-307(C)(MICHIE 2003) 8

CAL. CORP. CODE §16303 10

CAL.CORP. CODE §16306 9

CAL. CORP. CODE §16306(A) 7, 17

CAL. CORP. CODE. §16307(C) 8

COLO. REV. STAT. §7-64-307(3)(2003), ... 8

CONN. GEN. STAT. §34-328(C)(2003) 8

DEL. CODE ANN. TIT. 6 §15-307(C)(2003) 8

FLA. STAT. ANN. §620.8307(3)(WEST 2003), ... 8

GA. CODE ANN. §9-2-26 (2002) 8

HAW. REV. STAT. §425-118(C)(2003) 8

IDAHO CODE §53-5-307(C)(MICHIE 2003) 8

IOWA CODE §486A.307(3)(2003) 8

I.R.C. §6031(A), ... 5

I.R.C §6303 ..... 2, 34

I.R.C. §6330 39

I.R.C. §6501 ..... 34, 44, 46

I.R.C. §6502 34

I.R.C. §6502(A) 44

I.R.C. §6672 ..... 13, 14

I.R.C. §6901 ..... 16, 17, 18

KAN. STAT. ANN. §56A-307(C)(2003) 8

LA. CODE CIV. PROC. ANN. ART. 737 (WEST 2003) 8

MD. CODE ANN. CORPS. & ASS'NS §9A-307(C)(2003) 8

MINN. STAT. §323A.3-07(C)(2003) 8

MISS. CODE. ANN. §13-3-55(2003) 8

MONT. CODE. ANN. §35-10-312(C)(2003) 8

NEB. REV. STAT. §67-419(3)(2003) 8

N.D. CENT. CODE §45-15-07(3)(2003), ... 9

N.J. STAT. ANN. §42:1A-19(C) (WEST 2003) 8

N.M.STAT. ANN. §54-1A-307(C)(MICHIE 2003) 8

OKLA. STAT. TIT. 54, §1-307(C)(2002) 9

OR. REV. STAT. §67.110(3)(2003) 9

REV. RUL. 73-526, 1972-3 C.B. 404 6

S.D. CODIFIED LAWS §48-7A-307(C)(MICHIE 2003) 9

TENN. CODE ANN. §61-1-307(C)(2003) 9

TEX. REV. CIV. STAT. ANN. ART.6132B-3.05(C)(2003) 9

TREAS. REG. § 1.6031(A)-1 5

TREAS. REG. §301.6203-1 37

VT. STAT. ANN. TIT. 11, §3227(C)(2003) 9

VA. CODE ANN. §50-73.97(C)(MICHIE 2003) 9

W.VA. CODE §47B-3-7(C)(2003) 9

WASH. REV. COD ANN. §25.05.130(3)(WEST 2003) 9

WYO. STAT. ANN. §17-21-307(C)(MICHIE 2003) 9

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY 837 (6TH ED. 1990) 9

GENERAL COUNSEL MEMORANDUM 34329 (JULY 30, 1970) 4, 5

INTERNAL REVENUE MANUAL §5.11.1.2.2.5 35

INTERNAL REVENUE MANUAL §5.12.1.18.3(1) 35

INTERNAL REVENUE MANUAL §5.12.1.18.3(3) 35

STATEMENT

Respondents are general partners of Marina Cabrillo Partners ("The Partnership"). The Partnership filed federal employment tax returns showing balances owed at various times between 1992 and 1995. The Internal Revenue Services ("IRS") made assessments of the taxes shown on those returns (which named The Partnership) between 1992 and 1996. The IRS did not make any assessments against the Respondent partners individually.

The IRS failed to file assessments naming the Respondents and failed to provide statutory notice and demand for payment. Despite these failures, the IRS claims to have taken collection action against the Respondent partners in an effort to collect the taxes. These collections efforts included the filing of notices of federal tax liens against Respondents individually. See, Joint Appendix at p.100-104, which shows that the Proof of Claims filed against Respondents in their bankruptcy cases were mostly secured claims, based upon notices of federal tax liens filed against Respondents in 1998.

The Gallettis' filed their joint voluntary chapter thirteen petition on October 20, 1999 and the Briguglios' filed a joint voluntary chapter thirteen petition on February 4, 2000. The Briguglios and Gallettis' ("Respondents") learned of the IRS' secured claims against them from the Proof of Claims which the IRS filed in their respective bankruptcies. Joint Appendix at p. 100 to 104.

The IRS's secured claim filed against the Galletti's, in the amount of $395,006.37, consisted of over $240,000 in penalties and interest which had accumulated in the five to six year period between the

date the taxes were first due and the date of their bankruptcy petition. The IRS' secured claim against the Briguglio's in the amount of $403,264.06, consisted of over $265,000 in penalties and interest which had accumulated in a five to six and a half year period between the tax period and the Briguglios' bankruptcy petition. Thus, over sixty percent (60%) of each of these secured claims against the Respondents consisted of interest and penalties which had been accumulating unbeknownst to the Respondents. Only The Partnership was named on the assessment, and there is no evidence in the record that notice and demand for payment pursuant to IRC §6303 had been given to the individual Respondents.

SUMMARY OF ARGUMENT

The IRS timely assessed federal employment tax obligations against The Partnership, but failed to name Respondents in the assessment documents and failed to provide notice and demand for payment to Respondents. I.R.C. §6303 requires that the IRS *shall*, within sixty days, give notice and demand payment *to each person liable for the unpaid tax.* When the employment taxes remained unpaid, the United States sought to enforce this tax liability against the Respondents who were primarily liable (due to the joint and several liability under California state law) for the debts of The Partnership.

This case poses the question of whether Respondents, as general partners, are primarily liable or secondarily liable for the collection of employment taxes which the partnership "employer" failed to remit. If Respondents are primarily liable for the partnership taxes, then – as the Ninth Circuit held – the IRS must

make timely assessments against the Respondents individually in order to collect the taxes from Respondents (or must sue Respondents) before the expiration of the three year period of limitations on assessments as set forth in I.R.C. §6501. The assessment "triggers" the notice and demand for payment of the amount past due as required in I.R.C. §6303.

If Respondents are secondarily liable for the partnership taxes, then the Ninth Circuit's ruling that the IRS must assess the Respondents to collect the partnerships taxes is incorrect. Nevertheless, the Ninth Circuit's *conclusion* that it is now too late for the IRS to pursue Respondents for the partnerships taxes is correct even if Respondents are secondarily liable for the partnership taxes. Because the United States argues that the IRS may collect partnership taxes from general partners at any time during the ten-year period of limitations governing collection action against The Partnership, this Court, if it concludes that Respondents are secondarily liable for the partnership taxes, must address the issue of whether the IRS may invoke state law to assert secondary liability against Respondents without being bound by the state period of limitations.

The IRS frames the issue presented as "[w]hether, in order to enforce the derivative liability of partners for tax debts of their partnership, the United States must make a separate assessment of the taxes owed by the partnership against each of the partners directly." In phrasing the issue presented in this manner, the United States assumes that partners are secondarily (or, as the United States says, "derivatively") liable for partnership taxes. The manner in which the United States poses the question

presented avoids the issue: Whether the partners are primarily liable for the tax and thus subject to the same assessment and collection procedures as the partnership itself? The Ninth Circuit held that partners are taxpayers and are primarily liable for partnership taxes. This Court must address the issue of primary versus secondary liability before addressing the issue of whether the IRS may seek to collect the taxes from a general partner at any time during the ten-year period of limitations on collection, which applies to the assessed partnership, without first making an assessment against the individual partners.

The question of whether partners of general partnerships which owe taxes should be treated as primarily liable or secondarily liable, for purposes of IRS collection procedures, is not easily answered. This point was acknowledged over thirty years ago by the IRS in an internal memorandum now available to the public. In General Counsel Memorandum 34329 (July 30, 1970), IRS counsel addressed an inquiry from the IRS as to whether the IRS should assess a partnership or the general partners of a partnership which owed excise taxes. IRS counsel advised the IRS that the IRS should assess *both the partnership and the general partners* for the partnership's taxes because of the conflicting authorities in this area[1].

---

[1] Interestingly, the IRS concedes that it cannot assess the partnership tax naming the general partners of the partnership and does not have available the summary collection process. See Brief for the United States, p. 28 where it states "Under the abbreviated limitations period that would result from the decision in this case, however, the government *would be forced* to bring collection suits against partners within the three-year period prescribed by I.R.C. §6501(a), even though parallel efforts against the partnership may remain ongoing". (emphasis supplied)

The United States now claims that it will lose over $10 billion in the event it does not prevail in this case because the IRS has made assessments of taxes owed by general partnerships naming only the partnerships, without naming the partners. Brief for the United States, p.27.[2] The reason the IRS finds itself in this a situation is because it failed to follow the advice of its own attorneys. General Counsel Memorandum 34329, *supra*. The IRS's $10 billion "wound" will be completely self-inflicted if it comes to pass.

The failure of the IRS to follow the advice of its own counsel is particularly surprising given that it can easily make assessments for the general partners for partnership taxes. Every partnership is required to file an annual information return, Form 1065, which reflects partnership income (or losses) and contains a copy of the Form K-1 issued to each partner of the partnership. See I.R.C. §6031(a), Treas. Reg. § 1.6031(a)-1, IRS Form 1065 (2002). The Form K-1 issued to each partner contains the name, address and social security number (or tax identification number) of that particular partner. *Id.* Thus, it would be a relatively simple matter for the IRS to make an assessment against each general partner, based on the information in the Form K-1, for the partnership taxes.[3]

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[2] It is unclear how the IRS arrived at this $10 billion figure. The IRS, through counsel, declined Respondents' informal invitation to provide the supporting materials for this figure. It is also not clear what portion of the $10 billion figure is a) collectible from partnership assets without looking to the general partners, or b) uncollectible from both the partnerships and their general partners.

[3] In those cases where a new partnership files its employment taxes returns before it files its Form 1065, the IRS is not

The concept of assessing multiple persons who are jointly and severally liable for a single tax liability is not a novel concept. This happens every time a husband and wife file a joint income tax return.

Why, then, has the IRS been so vigorous in its challenge to the holding of the Ninth Circuit and the lower courts in the instant case? The IRS does not want to treat general partners as persons primarily liable for the taxes for assessment purposes, but at the same time, the IRS is attempting to collect partnership taxes by distraint from the general partners, the kind of action that can normally only be taken against persons who are primarily liable for the taxes. The IRS thus wants to avoid the "inconvenience" of making assessments for each general partner but wants the "convenience" of collecting the taxes from the partners

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prejudiced by the delay in receipt of the Forms K-1. This is because the three-year statute of limitations on assessing employment taxes does not run until April 15 of the year following the year in which the employment taxes accrue. I.R.C. § 6501(b)(2). The start of this three year period coincides with the "due date" of the Form 1065. I.R.C. §§ 6072(a) and 6031.

In addition, I.R.C. §6011(b) provides that the IRS is authorized to require such information with respect to "persons subject to the taxes imposed by chapter 21 [employment taxes] or chapter 24 [withheld income taxes] as is necessary or helpful in securing proper identification of such person." The IRS is empowered by this section, in conjunction with I.R.C. §6109(a) [supplying identifying numbers for persons], to require that quarterly partnership employment tax returns (Forms 941) include the names, addresses and identifying numbers of all general partners of the partnership as of the date on which the return is due. *See generally* Rev. Rul. 73-526, 1972-3 C.B. 404.

by the summary collection process (without having to file an action in court).

As discussed below, the IRS's conduct raises significant statutory and Constitutional concerns. Sustaining the Ninth Circuit's holding will allow the courts to avoid having to decide these statutory and Constitutional issues and will eliminate the need of the IRS to file an action in court every time it wants to pursue a general partner for taxes owed by a partnership. At the same time, the IRS will be able to administratively pursue collection action against general partners without running afoul of the Internal Revenue Code or the Constitution. Stated differently, a holding that Respondents should be treated as taxpayers primarily liable for the partnership taxes will facilitate the collection of partnership taxes by allowing the IRS to administratively pursue all parties who are primarily liable for the taxes.

ARGUMENT

THE INDIVIDUAL PARTNERS OF A GENERAL PARTNERSHIP ARE PRIMARILY LIABLE UNDER STATE LAW AND THEREFORE ARE TAXPAYERS WHO MUST EITHER BE SUED OR ASSESSED WITHIN THREE YEARS

Although the United States made a timely assessment naming The Partnership for its federal employment tax obligations, it did not assess or sue the individual partners within the statutory time limit. The general partners are taxpayers under the I.R.C. because they are jointly and severally liable with their partnership under California law. California Corp. Code §16306(a). Although this joint and several

liability of the Respondents arises from state law, the United States is precluded from collecting on this liability because, under California law, it must obtain a separate judgment against the partners. It did not do so and the time for obtaining a judgment against the Respondents had expired before they filed their respective bankruptcy petitions.

A. California Law Makes Partners Primarily Liable for Partnership Debts Because of Joint and Several Liability.

Virtually every state in the United States has statutory or case law which states that general partners of a partnership are liable for the all debts of the general partnership.[4]

[4] Ala. Code §10-8A-307(c)(2003), Alaska Stat. §32.06.307(c), Ariz. Rev. Stat. §29-1027(c)(2003), Ark. Code Ann. §4-46-307(c)(Michie 2003), Cal. Corp. Code. §16307(c)(West 2003), Colo. Rev. Stat. §7-64-307(3)(2003), Conn. Gen. Stat. §34-328(c)(2003), Del. Code Ann. tit. 6 §15-307(c)(2003), Fla. Stat. Ann. §620.8307(3)(West 2003), Ga. Code Ann. §9-2-26 (2002), Haw. Rev. Stat. §425-118(c)(2003), Idaho Code §53-5-307(c)(Michie 2003), 805 Ill. Comp. Stat. 206/307(c)(2003), *Thompson v. Wayne Smith Construction Co.*, 640 N.E.2d 408 (Ind. App. 1994), Iowa Code §486A.307(3)(2003), Kan. Stat. Ann. §56a-307(c)(2003), *Heavrin v. Lack Malleable Iron Co.*, 155 S.W. 729 (Ky. 1913), La. Code Civ. Proc. Ann. art. 737 (West 2003), *Gordon v. Texas Co.*,119 Me. 49 (1920), Md. Code Ann. Corps. & Ass'ns §9A-307(c)(2003), *Curnane v. Curnane*, 27 N.E.2d 714 (Mass. 1940), *Webber v. Richter*, 187 N.W. 528 (Mich. 1922), *Allgeier, Martin & Assoc. v. Ashmore*, 508 S.W.2d 524 (Mo. 1974), Minn. Stat. §323A.3-07(c)(2003), Miss. Code. Ann. §13-3-55(2003), Mont. Code. Ann. §35-10-312(c)(2003), Neb. Rev. Stat. §67-419(3)(2003), *Diamond Nat'l Corp. v. Thunderbird Hotel, Inc.*, 85 Nev. 271 (1969), N.J. Stat. Ann. §42:1A-19(c) (West 2003), *Rosenblum v. Judson Eng'g Corp.*, 99 N.H. 267 (1954), N.M.Stat. Ann. §54-1A-307(c)(Michie 2003), *Dwiggins v. Parkway Bus* Co., 230 N.C. 234 (1949), Spencer *Kellogg & Sons, Inc. v. Bush*, 31 Misc. 2d 70 (N.Y. 1961), N.D. Cent. Code §45-15-07(3)(2003), *Bennett v. Oberlin Bakeries Co.*, 1 Ohio Law Abs 870 (1923), Okla. Stat. Tit. 54, §1-307(c)(2002), Or. Rev. Stat. §67.110(3)(2003), *Nisenzon v. Sandowski*, 689 A.2d 1037 (R.I. 1997), *Mansour v. Massey*, 287 S.C. 176 (1985), S.D. Codified Laws §48-7A-307(c)(Michie 2003), Tenn. Code Ann. §61-1-307(c)(2003), Tex. Rev. Civ. Stat. Ann. art.6132b-3.05(c)(2003),*Hamner v. B.K. Bloch & Co.*, 52 P.770 (Ut. 1898), *Tax Review Board v. D. H. Shapiro Co.*, 409 Pa. 253 (1962), Vt. Stat. Ann. tit. 11, §3227(c)(2003), Va. Code Ann. §50-73.97(c)(Michie 2003), Wash. Rev. cod Ann. §25.05.130(3)(West 2003), W.Va. Code §47B-3-7(c)(2003), *Ch2M Hill, Inc. v. Black & Veatch*, 557 N.W.2d 829 (Wis. 1996), Wyo. Stat. Ann. §17-21-307(c)(Michie 2003).

The nexus between a general partnership and its general partners is substantively different from the relationship between other taxpayers and the parties which the IRS might seek to hold secondarily liable using the methods described above. A general partner is jointly and severally for the entire amount of a partnership's tax debt merely by virtue of being a general partner at the time the tax debt arose. *See* Cal.Corp. Code §16306. Black's Law Dictionary defines joint and several liability as:

> [T]he liability of copromisors of the same performance when each of them, individually, has the duty of fully performing the obligation, and the obligee can sue all or any of them upon breach of performance. . . *Such liability permits the Internal Revenue Service to collect a tax from one or all of several taxpayers.* A husband and wife that file a joint income tax return usually are collectively or individually liable for the full amount of the tax liability. I.R.C. §6013.

Black's Law Dictionary 837 (6th ed. 1990). (emphasis

added)

Other third parties subject to potential claims of secondary liability for taxes owed by taxpayers, unlike general partners, will normally be held liable only for a portion of the taxes owed by the original taxpayer. See, e.g., I.R.C. §§ 3505, 6672, and 6324 and the discussion below. While it is possible that some of these other third parties could eventually be subject to a claim up to the entire amount of the taxes owed by the original taxpayer (i.e., such as where property equal to or in excess of the amount of gift or estate tax owed is transferred to a transferee), these other third parties are not jointly and severally liable for the full amount of the tax owed by the original taxpayer.

This is not the case with general partners of partnerships that owe taxes. The fact that they are general partners, a fact that can normally be ascertained from the Forms K-1 submitted with each annual partnership Form 1065,[5] means that they are primarily liable for the entire amount of the taxes owed by the partnership. The issue is not whether general partners can be held liable for the tax debts of the general partnership. What is at issue is the manner in which the IRS *enforces* the liability against the general partners for partnership tax debt. The Respondents are liable for the Partnership's debts; however, these debts are not collectible because the period of limitations have passed. The bankruptcy court

[5] It may also be possible for the IRS to ascertain the identity of general partners from documents filed under state law. *See* Cal. Corp. Code §16303. California Form GP-1, filed pursuant to I.R.C. §16303, asks that the partnership list the full names and mailing addresses of all partners or that the partnership provide the full name and mailing address of an agent who will maintain a list of the names and mailing addresses of all partners.

properly sustained the Respondent/debtors' objections to the Proof of Claims of the IRS because they are "unenforceable against the debtor and property of the debtor." 11 U.S.C. § 502(b)(1).

B. Partner Liability Is Not Secondary ("Derivative") Liability.

The United States borrows the concept of secondary (or "derivative") liability in its brief and fails to provide it a definition. There are a number of different kinds of secondary liability for a tax owed only by the "taxpayer." Some types of secondary liability involve the imposition of liability on third parties pursuant to federal law, while other types of secondary liability involve the imposition of liability on third parties pursuant to state law. This can be an important distinction in the method by which the IRS attempts collection from secondarily liable parties and in differences in the periods of limitation governing such collection efforts. There are even important distinctions, involving collection practices and periods of limitation, among the various types of secondary liability imposed under federal law. The United States' Brief incorrectly treats the various types of secondary liability as if they are identical in all respects.

There is one thing that all types of secondary liability have in common: Every person or entity that is secondarily liable for the tax is a person or entity *other than the person who is identified as the taxpayer under I.R.C. §6203.* In other words, persons not liable for the tax can be held secondarily liable for a tax. Because secondarily liable persons are, by definition, not the "taxpayer," the collection procedures applicable to "taxpayers" do not necessarily apply to

the collection of the secondary liability from these parties. In fact, the United States' Brief fails to acknowledge that none of the provisions involving secondary liability discussed below permit the IRS to take *administrative collection action* against those asserted to be secondarily liable unless the IRS has made a *separate assessment* against that person[6].

1. Secondary Liability Can Be Imposed By Federal Law

a. Lender Liability (I.R.C. §3505)

I.R.C. §3505 allows the IRS to collect a portion of the taxes shown on a taxpayer's Form 941 (Federal Employment Tax Return) from a lender or other third party who pays the wages of the taxpayer's employees directly, I.R.C. §3505(a), or who supplies funds to a taxpayer for the purpose of paying the taxpayer's wages knowing that the taxpayer will not be making federal tax deposits of the employment taxes incurred by the taxpayer as the result of payment of the wages. I.R.C. §3505(b).

This Court held in *Jersey Shore State Bank v. United States*, 479 U.S. 442 (1987), that the IRS was not required to provide notice and demand for payment under I.R.C. §6303(a) to a party which the IRS was seeking to hold liable under I.R.C. §3505. In reaching

[6] The IRS discusses in its brief what it claims are its general practices in pursuing collection action against general partners for partnership taxes. Brief for the United States at p.28. As is discussed below, the IRS's discussion of its own practices is not accurate.

this conclusion, this Court noted that the lender's liability might very well be less than the amount stated in the I.R.C. §6303(a) notice. 479 U.S. at 446-447. This Court also noted that the IRS may not seek to impose liability against a party under I.R.C. §3505 by taking administrative collection action, but only by bringing suit. 479 U.S. at 447-448.

Liability under I.R.C. §3505 is for an amount less than the original tax assessed against the primarily liable "taxpayer." The IRS may not seek administrative collection action against the third party pursuant to I.R.C. §3505 based upon the original assessment for the taxpayer. Rather, the IRS must bring suit in court against the third party to enforce this liability.

b. Responsible Person Liability (I.R.C. § 6672)

I.R.C. §6672 allows the IRS to impose secondary liability on persons who qualify as so-called "responsible persons" to the extent of the "trust fund" portion of the tax shown on a taxpayer's employment tax returns (Forms 941) and other federal returns for taxes which the taxpayer is supposed to withhold from its employees and remit to the federal government. These "trust fund" taxes for which the IRS can impose liability under I.R.C. §6672 are less than the amount of taxes for which the taxpayer is liable. *See Slodov v. United States*, 436 U.S. 238 (1978)

Section 6672 establishes a special administrative procedure for asserting secondary liability under that section. The IRS is required to issue a written notice to each person who the IRS proposes to hold liable. I.R.C. §6672(b). The person is then granted administrative

appeal rights. *Id.* If the person fails to appeal or is not successful with the administrative appeal, the IRS then makes a separate assessment against the person, thereby creating a new "taxpayer" for purposes of the tax collection process.[7] There is a three year period of limitations on the ability of the IRS to assess third parties under I.R.C. §6672 which incorporates I.R.C. §6501, *Lauckner v. United States*, 68 F.3d 69 (3rd Cir. 1995), *Jones v. United States*, 60 F.3d 584 (9th Cir. 1995).

In summary, liability under I.R.C. §6672 is for an amount less than is owed by the original taxpayer. The IRS may not take administrative collection action to collect this liability directly from secondarily liable persons based upon the initial assessment against the taxpayer. Rather the IRS must make a separate assessment against the third party and treat them as a "taxpayer" in their own right. There is a three-year statute of limitations on making an assessment against a third party under I.R.C. §6672.

c. Transferee Liability

Federal law imposes substantive liability on certain transferees of federal taxpayers. I.R.C. §6324(a) provides that a transferee of a decedent's estate is personally liable for the estate tax owed by the decedent's estate "to the extent of the value, at the time of the decedent's death" of the property transferred to that third party. Similarly, I.R.C.

[7] The IRS will collect the "trust fund" taxes only once, so that payment of those taxes by the initial "taxpayer" (the employer) will result in the IRS forgoing collection activity from the "responsible person(s). *See United States v. Energy Resources Co., Inc.*, 495 U.S. 545 (1990).

§6324(b) of the Internal Revenue Code provides that a donee of a gift shall be liable for the gift tax owed by the donor to the extent of the value of such gift.

I.R.C. §6901 provides a procedure for making separate assessments against transferees for their personal liability for the pertinent portion of the original taxpayer's estate or gift tax liability. Section 6901 also provides a period of limitations on assessing transferees under that section. I.R.C. §6901(c). Thus, if the IRS follows the procedures set forth in I.R.C. §6901, the persons who are secondarily liable for some portion of the taxpayer's estate or gift tax will be assessed separately for the pertinent portion of the original tax liability for which they are liable.

Most courts have held that the IRS, in pursuing such transferees, has the option of either assessing the transferees individually pursuant to I.R.C. §6901, within the period of limitations imposed by that section, or filing a court action against the transferee. *See, e.g., United States v. Botefuhr*, 309 F.3d 1263 (10th Cir. 2002), *United States v. Russell*, 461 F.2d 605 (10th Cir. 1972), *contra, United States v. Schneider*, 92-2 U.S.T.C. ¶60,119 (D.N.D. 1992). None of the cases cited here or in the Brief for the United States state that the IRS may take administrative collection action to enforce the personal liability of a transferee without first making a separate assessment against the transferee under I.R.C. §6901.[8]

Liability under the federal transferee provisions set forth in I.R.C. §6324 is limited to the extent of the

[8] The concept of asserting personal liability against a transferee is to be distinguished from efforts by the IRS to enforce a lien against property which is in the hands of a transferee. *See Ripley v. Commissioner*, 102 T.C. 654 (1994).

value of the property received by the transferee from the estate or donor, respectively. The IRS may not take administrative collection action to enforce personal liability against the transferee based upon the assessment against the original taxpayer. Rather, the IRS must either assess the transferee personally under I.R.C. §6901 or bring suit in court against the transferee. An assessment of federal secondary liability under I.R.C. §6901 is subject to the independent period of limitations set forth in that section.

There are additional types of federal secondary liability, i.e., 31 U.S.C. §3713,[9] but the examples set forth above are sufficient to illustrate the diverse manner in which federal law deals with enforcement of secondary liability for taxes.

2. Secondary Liability Can Be Imposed By State Law

There are occasions where state law provides the IRS with the means to hold a party secondarily liable for a tax owed by the taxpayer. Typically, these occasions involve an assertion by IRS of a fraudulent conveyance from the taxpayer to another or a person's assumption of the tax liability of another under state law. This Court stated in *Commissioner v. Stern*, 357 U.S. 39 (1958), that the IRS has two ways in which it can assert transferee liability under state law. First, the IRS can assess the third party individually pursuant to the procedures set forth in what is now

[9] This section provides priority treatment for federal debts in the case of insolvent decedent's estates. *See United States v. Estate of Romani*, 523 U.S. 517 (1998).

I.R.C. §6901. Second the IRS can initiate court action against the third party based upon state law fraudulent conveyance laws. *Id.* at 43. Thus, I.R.C. §6901 and its predecessor were only intended to be a procedural mechanism for asserting liability under state law. *Id.* at 42.

In *Stern* this Court declined the IRS's invitation to hold that the predecessor to I.R.C. §6901 mandates the creation of a body of federal substantive decisional law dealing with transferee liability. This Court stated that such a result would have been "a sharp break with the past," noting that the lower courts had previously relied on state law to decide transferee liability cases involving the IRS and that the IRS itself had relied on state law in similar cases. *Id.* at 44. This Court then went on to note that Congress was aware of this practice when it enacted the predecessor to I.R.C. §6901 and refrained from disturbing the prevailing practice when it enacted that statute.

> Since Congress has not manifested a desire for uniformity of liability, we think that the creation of a federal decisional law would be inappropriate in these cases. . . . . Accordingly, we hold that, until Congress speaks to the contrary, the existence and extent of liability should be determined by state law. *Id.* at 45.

Both the existence and extent of a general partner's liability for partnership debt is determined (created) by state law (see California Corporations Code §16306(a) and footnote 3 *infra*). Some courts have held that the IRS is no different than any other litigant which invokes state fraudulent conveyance laws and is bound by state periods of limitation on such actions.

United States v. Vellalos, 780 F. Supp 705 (D. Hawaii 1992), *appeal dismissed*, 990 F.2d 1265 (9th Cir. 1993)(unpublished table decision). Other courts have held that the IRS is not bound by state periods of limitation on fraudulent conveyance and transferee liability actions even where the sole basis for the assertion of secondary liability is state law and the state period of limitations on such suits would have barred such an action had the plaintiff been any party other than the federal government. *Bresson v. Commissioner*, 213 F.3d 1173 (9th Cir. 2000). Rather, these courts hold that the IRS may assert secondary liability under state fraudulent conveyance laws at any time during the ten year federal limitations period for collection against the original taxpayer, even if such an assertion of secondary liability would be barred applying the same state law which created the right of the IRS to assert secondary liability. This rationale, however, applies because the liability is created by federal statute which has its own limitations period (I.R.C. §6901).

Respondents discuss below how the IRS is barred by state periods of limitation, the same as any other litigant, whenever the IRS invokes state law to assert secondary liability beyond the state period of limitations. For purposes of the present discussion, it is sufficient to note that the lower courts are divided on the issue of whether the IRS must be treated the same as any other litigant when it invokes state law to assert secondary liability.

C. Partners Are Taxpayers under the IRC and must Be Assessed or Sued for the Partnership Tax Debt.

1. The Respondents Are Liable for Partnership Tax Debt, and the Debt Is Unenforceable Due to the Expiration of the Limitations Period of I.R.C.§ 6501(a)

I.R.C. §7701(a)(14) defines a "taxpayer" as "any person subject to any internal revenue tax." A "person" includes an individual, a trust, estate, partnership, association, company or corporation. I.R.C. §7701(a)(1). An "individual" is included in the statutory definition of "person" and "person" is included in the statutory definition of "taxpayer." An "individual" can be a partner but a partnership is distinct under I.R.C. §7701. While the Internal Revenue Code defines the terms "partnership" and "partner" in I.R.C. §7701(a)(2), there is no provision in the Internal Revenue Code which states that general partners are liable for taxes of a partnership.[10]

Such a result is also consistent with this Court's opinion in *United States v.Williams*, 514 U.S. 527 (1995). In *Williams*, this Court held that a person who

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[10] The Internal Revenue Code contains detailed provisions for the audit of Forms 1065 filed by so-called "TEFRA" partnerships. See I.R.C. §6221 et seq. These provisions deal with the audit process, judicial review of the results of the audit of the Form 1065, and the assessment of income tax deficiencies resulting from such administrative and judicial proceedings. The provisions do not deal with the collection of taxes or with employment taxes. Indeed, partners, not the partnerships themselves, are liable for any taxes owed on partnership income.

was not personally liable for the tax, but on whose property the IRS held a lien, was a "taxpayer" for purposes of I.R.C. §7701(a)(14). Such a taxpayer could bring a suit for the refund of amounts paid to satisfy a federal tax liability. Because Respondents here are personally liable for the tax, this Court need not go as far as it did in *Williams* when it held that a person who is not being held personally liable for a tax liability can be a "taxpayer" under I.R.C. §7701(a)(14). This Court's ruling in *Williams*, however, is consistent with the concept of treating Respondents as "taxpayers" for purposes of the IRS assessing and collecting The Partnership's tax liabilities from them personally.

I.R.C. §6201 authorizes the Secretary of the Treasury to make assessments imposed by the Internal Revenue Code. With respect to taxes shown on "balance due" returns filed by taxpayers (which is the case here), I.R.C. §6201(a) provides that the "Secretary shall assess all taxes determined by the taxpayer or by the Secretary as to which returns or lists are made under this title."

Section 6203, entitled "Method of Assessment," states that "[t]he assessment shall be made by recording the liability *of the taxpayer* in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary" (emphasis added). Regulations promulgated under I.R.C. §6203 provide for the manner in which the liability a particular taxpayer is "assessed," i.e., recorded on the books and records of the IRS. 26 C.F.R. §301.6203-1. These regulations provide for recording of both the amount of a tax liability and the name(s) of the person(s) liable for the tax liability. *Id.*

I.R.C. §6303 provides that the Secretary "*shall*, as soon as practicable, and within sixty days, after the

making of an assessment of a tax pursuant to I.R.C. §6203, *give notice to each person liable for the unpaid tax*, stating the amount and demanding payment thereof" (emphasis added). This notice "shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address." Once the IRS has made an assessment of a tax against a particular taxpayer, the next step is for the IRS to send that taxpayer notice and demand addressed to the taxpayer's proper address within sixty days of the assessment. Failure to provide the taxpayer with proper notice and demand within sixty days of the assessment bars the IRS from taking administrative collection action against the taxpayer and stops the running of interest on the tax debt. *See United States v. Chila*, 871 F.2d 101 (11th Cir. 1989), *United States v. Berman*, 825 F.2d 1053 (6th Cir. 1987), *Resyn Corp. v. United States*, 945 F.2d 1279 (3rd Cir, 1991), *Blackston v. United States*, 778 F. Supp. 244 (D. Md. 1991).

In addition, the language of I.R.C. §6303, which requires the IRS to give notice and demand to "each person liable for the unpaid tax," is broad enough to apply to efforts by the IRS to administratively collect the partnership tax debt from a general partner after assessing that general partner personally under I.R.C. §6203. There is no doubt that a partner of a general partnership, by virtue of their joint and several liability for the entire amount of the tax under state law, is a "person liable for the unpaid tax" of the partnership. This is to be contrasted with the situation faced by the Court in *Jersey Shore State Bank*, 479 U.S. 442, where liability under I.R.C. §3505 is a separate debt for an amount less than the amount owed by the "taxpayer." *Jersey Shore*, 479 U.S. at 447.

The relevant statutes dealing with the assessment and collection of taxes from "taxpayers" are sufficiently broad to permit this Court to hold that the IRS must treat general partners as "taxpayers" primarily liable for the partnership taxes. To make an assessment with respect to a taxpayer the IRS must make an assessment within three years of the "due date" of a timely filed partnership tax return. A "taxpayer" is defined as "any person subject to any internal revenue tax." I.R.C. §7701(a)(14).

I.R.C. §6321 provides that "if any person *liable to pay any tax* neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property. . . belonging to *such person*" (emphasis added). The I.R.C. §6321 lien, by the statute's own terms, attaches only to the property of the person who is liable for the tax.

I.R.C.§6323 provides for the filing of a notice of federal tax lien to perfect the IRS's lien against certain third party purchasers and creditors. Thus, if a taxpayer is assessed a tax, is given timely notice and demand and thereafter fails to pay the tax, the next step is for the IRS to file a notice of federal tax lien against the taxpayer to perfect the IRS's lien vis-a-vis third parties.

I.R.C. §6320 provides for administrative and judicial appeal rights when the IRS has filed a notice of federal tax lien against a "person described in I.R.C. §6321... ." Thus, where the IRS has filed a notice of federal tax lien against a person liable for the tax (i.e. a person primarily liable for the tax), that person may appeal (after the fact) the IRS's decision to file a notice of federal tax lien.

I.R.C. §6330 provides that the IRS may not levy

"on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing" under that section. The IRS has interpreted I.R.C. §6330 to only apply to the "person liable to pay the tax due after notice and demand who refuses or neglects to pay." Treas. Reg. §1.301.6330-1(a)(3)(Question A-1). Assuming that a taxpayer is assessed a tax, is given timely notice and demand for payment and thereafter fails to pay the tax, and then has a notice of federal tax lien filed against it, the next step, if the tax remains unpaid, is for the IRS to send a notice of intent to levy to the person(s) primarily liable for the tax. That person(s) may then appeal (before the fact) the IRS' decision to levy on the taxpayer's property.

The language of I.R.C. §6011(b) also supports treating Respondents as "taxpayers" against whom the IRS must proceed by assessing the tax within the statute of limitations set forth in I.R.C. §6501. That section authorizes the IRS to require the information that is "necessary or helpful in securing proper identification" of persons subject to FICA and withholding taxes. This statute expressly authorizes the IRS to require that employment tax returns (Forms 941) filed by partnerships include the names, addresses and identifying numbers of the partners of the partnership so that the IRS can assess the partners (in addition to assessing the partnership) as persons "subject to" the taxes in question.

As can be seen from the statutes and regulations above, there is a comprehensive statutory scheme that must be followed when the IRS seeks to collect taxes against a person primarily liable for a tax. The first step in that process, however, is to record the liability of that person on the books and records. I.R.C. §6203.

As is discussed in greater detail below, the IRS can not assess a tax without reference to a particular taxpayer. To do so would run afoul of the statutory scheme for administrative collection of the tax and possibly the Due Process Clause of the Fifth Amendment.

A holding that the IRS is required to assess Respondents individually to collect partnership taxes from them (because Respondents are primarily liable for the tax) will also avoid potential administrative difficulties for the IRS. Under the IRS's position, it is unable to make assessments directly against general partners to collect the taxes of the partnership because they are not "taxpayers" primarily liable for the tax. In addition, the IRS clearly is unable to make any assessments against general partners under I.R.C. §6901 based on secondary liability. I.R.C. §6901 is generally not applicable to the collection of employment taxes, the type of taxes owed by the partnership in which Respondents were partners. I.R.C. §6901(a)(1).[11] This leaves the the IRS with only one option to collect what the IRS claims is a partner's secondary liability for a partnership's taxes; file an action in court against the general partner. It is obviously a much heavier burden for the IRS to proceed to court against a general partner on secondary liability than it is for the IRS to assess a general partner as a person primarily liable for partnership taxes.

Failing to determine general partners are taxpayers (and thereafter requiring the IRS to assess Respondents individually within the three year period of limitations in I.R.C. §6501) thrusts the IRS into a

[11] The only circumstances under which I.R.C. §6901 authorizes the IRS to assess employment taxes directly against a third party is where a partnership has been liquidated. I.R.C. §6901(a)(2).

situation where the only way it could collect partnership taxes from the general partners would be to file a court action, based upon state law, against the general partners. Why is the IRS denying its ability to separately make assessments for general partners as taxpayers just as its own counsel advised thirty years ago when it recommended assessment of both a partnership and the general partners for taxes owed by the partnership?

2. Other Circuit Decisions Are Not in Conflict with the Ninth Circuit's Holding in this Case Because They Did Not Decide the Same Issue

The Government cites numerous cases for the proposition that general partners are liable for the tax debts of the partnership, including *Young v. Riddell*, 283 F.2d 909 (9th Cir. 1960), *United States v. Papandon*, 331 F.3d 52 (2nd Cir. 2003), *Remington v. United States*, 210 F.3d 281 (5th Cir. 2000), *Ballard v. United States*, 17 F.3d 116 (5th Cir. 1994), *United States v. Hays*, 877 F.2d 843 (10th Cir. 1989), *Calvey v. United States*, 448 F.2d 177 (6th Cir. 1971), and *Tony Thornton Auction Services, Inc. v. United States*, 791 F.2d 635 (8th Cir. 1986). For the most part, these cases do not add anything to the United States' analysis beyond the citation to §16306(a) of the California Corporations Code (West Supp. 2003), which states that general partners are jointly and severally liable for the debts of a general partnership. There is no dispute on this proposition of law. These decisions, never address the question of *how the IRS must enforce the personal liability of the general partners for the partnership's taxes.* The Ninth Circuit's opinion in *Young v. Riddell*

merely states that a putative partner of a partnership who has already paid the partnership tax liability can not obtain a refund of the amounts paid where he fails to prove he was not a partner. This opinion does not address the issue of how the IRS enforces the *collection* of the partner's liability.

The Government cites a number of cases in its brief, but none of them address in any detail the issue of whether the IRS should collect partnership taxes from general partners through the assessment and collection process governing primary liability or instead through court action associated with secondary liability.

The Second Circuit's opinion in *Papandon* notes that the IRS made assessments directly against the partners based upon New York law similar to §16306(a) of the Cal. Corp. Code. *Papandon*, 331 F.3d 52 at n. 2. Thus, the Second Circuit's opinion hardly stands for the proposition that the IRS is not required to assess a partner within the three year statute of limitations on assessment under I.R.C. §6501 as a "taxpayer" primarily liable for the partnership's taxes.

Other cases where the taxes had not been paid as of the start of the litigation, such as *Remington*, *Ballard*, *Hays* and *Tony Thornton Auction Service*, never addressed whether the IRS must collect the liability of a general partner for a partnership's tax liability as primary liability through administrative collection activities or as a secondary liability through court action. This may have been because arguing that the IRS must assess against the partner individually within the three-year period of limitations of I.R.C. §6501, would have been a fruitless act. If it sued in court prior to the expiration of the three year period of limitations for assessment, the IRS could have obviated any argument that it had to make an assessment as to

the partner as a "taxpayer" by filing a timely (prior to the expiration of the three-year period of limitation) cross action. *Cf. Berman*, 825 F.2d 1053, (IRS's failure to give proper notice and demand did not bar timely suit for judgment even though it barred administrative collection action).

Of course, it is also possible that the partners in the cases referenced above failed to consider the argument that the IRS must assess a partner's primary liability for partnership tax debt within the three year period of limitations under I.R.C. §6501, even though a successful assertion of the argument would have entitled the partners to prevail against the IRS. Such a failure of advocacy appears to have happened in the case of *United States v. Wright*, 57 F.3d 561 (7th Cir. 1995).

In *Wright*, the Seventh Circuit held that the filing of a bankruptcy by a taxpayer partnership operated to toll the period of limitations on collection action against the general partners for the partnership taxes. A review of both the Seventh Circuit's opinion and the opinion of the District Court which the Seventh Circuit reversed, *United States v. Wright*, 868 F. Supp. 1070 (S.D. Ind. 1994), reveals that the partners failed to argue that the proper method for holding them liable for the partnership taxes was for the IRS to assess them individually as primarily liable. The District Court found that the IRS had assessed the partners individually *Wright*, 868 F. Supp. at 1071, while acknowledging that the IRS claimed that the assessments were made only against the partnership. *Id.* The District Court did not think this factual dispute was material.

On appeal, the Seventh Circuit did not even address this factual dispute. Rather, in reversing the

District Court, the Seventh Circuit cited to this Court's Decision in *United States v. Updike*, 281 U.S. 489 (1930), to support the proposition that a "claim against derivatively liable persons remains alive under federal law so long as the taxpayer itself is liable." *Wright*, 57 F.3d at 563. *Updike*, however, involved an assertion of transferee liability, an example of secondary liability. In deciding that the filing of a bankruptcy by the taxpayer tolls the statute of limitations on the ability of the IRS to pursue a party who is secondarily liable for the taxes, the Seventh Circuit did not address the question of whether a general partner is primarily liable or secondarily liable for the partnership taxes. It assumed that partners are secondarily liable for partnership taxes because the issue was not contested by the Wrights.[12].

The Seventh Circuit, and the parties, therefore, appear to have never considered the possibility that the proper way for the IRS to have asserted liability against the partners was to assess them individually and that any failure to make such an assessment within the three year period of limitations for assessment precluded the IRS from pursuing the partners individually. Had such an argument been made by the partners and entertained by the Seventh Circuit, the factual dispute dismissed by the District Court as

[12] "...first that the debt to be collected from the Wrights is for 'taxes', and so is governed by federal rather than state law, and second that the claim against derivatively liable persons remains alive under federal law so long as the taxpayer itself is liable. The Wrights do not contest the first of these steps". *Id.* at 563. It is undisputed by the parties in *Wright* that the taxpayer was the partnership. Timely notice and demand to the partnership is presumed and gave rise to the ability to *collect the partnership's taxes* for a ten-year period under I.R.C. §6502.

immaterial would have moved center stage. If the IRS had never assessed the partners individually within the three year period of limitations imposed by I.R.C. §6501, then, had the Court accepted the position that partners must be treated as "taxpayers" primarily liable for the taxes, the IRS could not have pursued the partners individually for the partnership taxes (because of the IRS's failure to timely assess the individual partners). On the other hand, if the IRS had made separate assessments for the Wrights (as was found by the District Court) under I.R.C. §6501, those separate assessments would have resulted in an independent ten-year limitations period to collect from the Wrights. (That separate limitation period could have expired). If the parties subject to the assessment by the IRS, were the individual partners, the filing of the partnership bankruptcy should have had no effect whatsoever under those circumstances. The Seventh Circuit appears to have assumed that the underlying assessments were made only against the partnership, notwithstanding the finding of the District Court to the contrary. It then proceeded to reach the conclusion that, where a partnership has been assessed for taxes and thereafter files for bankruptcy, the bankruptcy suspends the limitations period for the IRS to pursue secondary liability against the partners. Assuming, arguendo, that a partner's liability for partnership taxes is secondary liability as the IRS contends, the Seventh Circuit's conclusion is incorrect for the reasons explained in the following section.

D. If Partners Are Not Taxpayers, Their Liability Arises Only under State Law and Enforcement Is Governed by State Limitation Periods

Assuming, arguendo, that Respondents are to be treated as persons who are secondarily liable for the partnership taxes, the United States is incorrect when it argues that secondary liability for taxes is always governed by the ten year federal statute of limitations on collection set forth in I.R.C. I.R.C. §6502. Where secondary liability is based upon state law, the IRS is bound by the state period of limitations the same as any other creditor.

The United States cites a number of cases in support of the proposition that, once the IRS makes an assessment against the partnership, the IRS can pursue the general partners for the partnership's taxes for the entire ten-year statute of limitations under I.R.C. §6502. As shown above, this analysis is incorrect if the Respondents are considered "taxpayers" against whom the IRS must make assessments within the three year period of limitations imposed by I.R.C. §6501.

Many of the cases cited by the IRS deal with transferee liability asserted by the IRS under *federal* law and are therefor inapplicable to the present case, which, to the extent it involves secondary liability, involves secondary liability under *state* law. This is particularly true where, as is the case here, there is no statutory mechanism equivalent to I.R.C. §6901 which would allow the IRS to administratively assess secondary liability under state law. For example, the IRS cites to *United States v. Botefuhr*, 309 F.3d 1263 (10th Cir. 2002), noting that the Court held that the failure of the IRS to assess a transferee gift tax liability

against a donee did not preclude the IRS from bringing suit against the transferee within the ten year statute of limitations on collection against the underlying taxpayer. This holding deals only with *federal* transferee liability created under I.R.C. §6901. It does not address whether, in asserting liability under state law, the IRS is bound by state statutes of limitation. Notably, however, the case does not stand for the proposition that the IRS may take administrative collection action against the transferee without a separate assessment against the transferee. Rather, the IRS must assert third party liability by lawsuit in the absence of a separate assessment against the purported transferee.

Similarly, the IRS cites to *United States v. Hunter Engineers & Constuctors, Inc.*, 789 F.2d 1436 (9th Cir. 1986), *cert.* denied, 479 U.S. 1063 (1987), *United States v. Dixieline Financial, Inc.*, 594 F.2d 1311 (9th Cir. 1979), and *United States v. First National Bank of Circle*, 652 F.2d 882 (9th Cir. 1981), all of which involve the assertion of liability under federal law, i.e., I.R.C. §3505. None of these cases address the question of the procedures that govern the IRS's assertion of secondary liability under state law.

The IRS fails to even mention, let alone discuss, this Court's most recent pronouncement in *Commissioner v. Stern*, 357 U.S. 39, regarding the IRS's assertion of liability against a third party under state law, pursuant to I.R.C. §6901. The IRS argued in that case that its lien attached to the insurance proceeds paid to a third party from a policy on the taxpayer's life, although state law provided that creditors of the decedent taxpayer could not pursue the third party for the insurance proceeds. In holding that state law governed the resolution of the case, this

Court stated:

> The Government's substantive rights in this case are *precisely those which other creditors would have under Kentucky law*. The respondent is not liable to the Government because Kentucky law imposes no liability against respondent in favor of [the decedent's] other creditors. *Id.* at 47 (emphasis added).

This Court made it very clear that, when the IRS asserted liability under state law, the IRS's rights are precisely the rights of any other creditor under state law.

In the case of *United States v. California*, 507 U.S. 746 (1993), this Court acknowledged that "[w]hether in general a state-law action brought by the United States is subject to a federal or state statute of limitations is a difficult question." In *dicta*, this Court analyzed the Government's argument that it is not bound by state statutes of limitation, and pointed out that the Government only cited cases including *United States v. Summerlin*, 310 U.S. 414, 416 (1940), in which "either the right at issue was obtained by the Government through, or created by, a federal statute", and *United States v. John Hancock Mut. Life Ins. Co., 364 U.S. 301 308 (1960)*, in which "a federal statute provided the statute of limitation." (28 U.S.C. §2410(c). Although the question was not answered in *California*, a logical inference might be that when the right at issue arises under state law, the state statute of limitations should apply. Indeed, the United States acknowledges in its Brief at page 10: "The government's derivative claim against the partners for the recovery of taxes owed by the partnership is based upon state partnership law."

In the absence of a California law provision providing that general partners are liable for the debts of the partnership, the United States would have no right to pursue Respondents in their capacity as general partners for the partnership tax debt. Thus, the United States is not asserting rights directly against Respondents which were obtained by federal statutes. The fact that federal law governs the efforts of the IRS to collect from the initial taxpayer does not mean that an effort to collect from a third party based on state partnership law involves enforcing federally created rights.

The limitations periods for asserting liability against Respondents under California law is decidedly not a federal period of limitations. That period of limitations is three years. *See* Cal. Code Civ. P. §338(a) (Three year statute of limitations on action for liability created by statute).

None of the cases cited by the United States regarding liability asserted under state law affect the analysis set forth above. The case of *Updike v. United States*, 281 U.S. 489, stands only for the proposition that, once the federal period of limitations for collection against a taxpayer has expired for a particular liability, all efforts by the IRS to collect that liability, including efforts to collect from third parties based upon state law, are barred. This Court did not preclude the possibility that, where the IRS is asserting secondary liability under state law, the state limitations period will bar a suit by the IRS for secondary liability to the extent such suits by private parties are also barred, even though the federal statute of limitations on the ability of the IRS to take collection action against the

taxpayer has not yet expired.[13]

The case of *United States v. Wright*, 57 F.3d 561, does not even address the issue of whether the state period of limitations bars the IRS from asserting liability for a partnership tax debt under state law. All parties in that case assumed that the only relevant period of limitations was the federal statute (I.R.C. §6502). Thus, *Wright* is of no assistance whatsoever to deciding the issue of whether state statutes of limitation apply to the IRS when it asserts secondary liability under state law.

E. The Administrative Practices of the IRS Evidenced by its Guidelines and the Cases it Cites Contradicts the IRS's Position in this Case

The statutory scheme contemplates and requires certain steps before the summary collection process is available to the IRS.. It contemplates an assessment of the tax as to a taxpayer (I.R.C. §6501). It requires notice of demand to be given to the "person liable for the tax" (I.R.C. §6303). Once these steps have been taken, the IRS is empowered to collect the tax by distraint.

The IRS instructs its employees that they may take administrative collection action against the general partners personally, including the filing of lien notices and the issuance of levies, based solely on the assessment naming the partnership and a notice and

[13] The IRS has not let this Court's opinion in *Updike* prevent it from invoking state law to assert secondary liability even where the federal statute of limitations on collection had expired. *See United States v. Scott*, 167 F.2d 301 (8th Cir. 1948).

demand issued to the partnership. Internal Revenue Manual §5.17.3.5.16(2) states that, where a partnership incurs taxes, "the partnership property may be levied upon as well as the property of each partner, to the extent a partner is liable for partnership debts." Internal Revenue Manual § 5.12.1.14.1(3) provides that "[w]here a partnership is the taxpayer and employment taxes are involved, the NFTL [notice of federal tax lien] should be prepared showing the words 'a partnership' after the partnership name AND list the names of all known general partners...."

Internal Revenue Manual §5.12.1.18.3(1) states that "[p]artners are individually liable for partnership debts, and *separate assessments against them are not essential* to sustain their individual liability." (emphasis added). Section 5.12.1.18.3(3) goes on to state that "[a] supplemental assessment will not be required when adding an individual partner's name to the partnership assessment. The Service will rely on the preposition [sic] that the assessment against the partnership creates a FTL [federal tax lien] against each individual partner."

Even though the IRS takes the position that it can levy on the property of general partners to collect a partnership tax liability without assessing the general partner, the IRS instructs its employees to *not* send an original Notice of Intent to Levy required by I.R.C. §6330 to the individual general partners. Internal Revenue Manual §5.11.1.2.2.5.

As these Manual provisions demonstrate, the IRS takes the position that, once it assesses a tax liability for a partnership, the IRS need not make separate assessments naming the general partners to begin taking collection action, including the filing of lien notices and the issuance of levies, directly against those

partners. The IRS also takes the position that, once it assesses a tax liability naming a partnership, it can levy against the property of the general partners without providing an I.R.C. §6330 notice to the partners.

The Brief for the United States suggests that, if the Court rules in favor of Respondents, such a ruling will force the IRS to pursue collection activity against general partners "prematurely." The United States represents its collection practices as: "Until now the IRS has typically pursued collection of partnership tax obligations from the partnerships before commencing litigation with partners to satisfy outstanding tax obligations. Under the abbreviated limitations period that would result from the decision in this case, however, the Government would be forced to bring collection suits against partners within the three-year period prescribed in I.R.C. §6501(a), even though parallel efforts against the partnership may remain ongoing." Brief for United States at p. 28. The language quoted above leaves the reader with the impression that 1) the IRS generally exhausts collection action against the partnership before pursuing collection action against the general partners, and 2) when the IRS pursues a general partner for a partnership tax debt it does so judicially rather than through administrative collection action.

As can be seen from the excerpts from the IRS's own Manual for its employees, the United States does not accurately state in its Brief what steps the IRS normally takes when a general partnership incurs tax liabilities. This failure not only leaves the Court with an inaccurate impression of how the IRS "does business" but also attempts to sidestep important statutory and Constitutional issues discussed below.

The IRS also argues that, because the IRS only

assesses "the tax" and not a particular taxpayer, citing *Anderson v. United States*, 15 F. Supp. 216 (Ct. Cl. 1936), the IRS can pursue a general partner for the partnership's taxes at any time during the period of limitations on collection after assessing the tax against the partnership. This is an incorrect statement of the law which obfuscates the distinction between primary and secondary liability for taxes. I.R.C. §6203 makes it quite clear that the IRS must record the liability *of the taxpayer* when making an assessment. The *Anderson* case involved facts which are so dissimilar to the present case so as to render the opinion irrelevant in the present context. To the extent the case has any relevance, the opinion fails to take into account the statutory language of what is now I.R.C. §6203. That language directs the IRS to record the liability of the taxpayer, not to record a liability without a name. That point is confirmed by Treas. Reg. §301.6203-1. The fact that the name of the taxpayer is recorded on a document separate from the RACS Report 006 or the Form 23C, see Brief for the United States at footnote 6, p. 13, is irrelevant. Without a name the assessment is incomplete and can not be enforced. I.R.C. §6203.[14]

Furthermore, recording a liability without a name is fruitless act, as the IRS must provide the person(s) "liable for the tax" with notice and demand for payment of the tax within sixty days of the date of assessment. I.R.C. §6303. This can not be done without a name, and, per I.R.C. §6203, that name must be that of the taxpayer, not that of an idle spectator or someone

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[14] The Internal Revenue Code goes even farther than requiring identification of a taxpayer by name. See I.R.C. §6109 (Requiring taxpayers to furnish an identifying number as established by regulations).

not yet known to the IRS.

As noted above, the IRS takes the position that it may take administrative collection action against general partners without making separate assessments against the general partners and without providing the general partners with timely individual notices and demand under I.R.C. §6303(a). Those two positions, positions which the IRS overlooks in its opening Brief, plainly violate the Internal Revenue Code as well as the Due Process Clause of the Fifth Amendment (see discussion below).

F. Treating General Partners as Taxpayers for Collection of Partnership Tax Debt Will Avoid the Need to Address Significant Statutory and Constitutional Issues Created by Current IRS Collection Practice

Due to the peculiar nature of the IRS's current collection practices when pursuing general partners for federal partnership taxes, treating the partners as third parties who are secondarily liable for the partnership taxes will force courts to address troublesome statutory and Constitutional issues. This can be avoided if the partners are treated as taxpayers primarily liable for the tax.

1. IRS's Current Collection Practices

As is discussed above, The IRS's practices, as reflected in the Internal Revenue Manual, are somewhat unusual. The IRS files notices of federal tax liens against partners to secure payment of partnership taxes without assessing the partners individually and without giving the individual partners

notice and demand. The IRS also levies on the property of partners to collect partnership taxes without assessing the partners individually, without giving them individual notices and demand for payment, and without sending them the notice required by I.R.C. §6330 before the IRS can levy.

The IRS has argued that notice and demand to the partnership operates as notice and demand to the partners, and several courts have agreed with this argument. *See, e.g., Adams v. United States*, 328 F. Supp.228 (D.Neb. 1971), *Underwood v. United States*, 118 F. 2d 760 (5th Cir. 1941), *contra, In re Robby's Pancake House, Inc.*, 24 B.R. 989 (Bankr. E. D. Tenn. 1982). The statutory and Constitutional obstacles to the IRS's argument are discussed below.

2. Statutory Issues Created by IRS's Current Collection Practices

The conduct of the IRS in this regard creates a number of statutory issues. As discussed previously, the IRS's practice of pursuing administrative collection action against general partners to collect partnership taxes without separately assessing each general partner and without providing each of them with individual notices and demand clearly violates the provisions of the Internal Revenue Code governing the assessment and collection of taxes. First, it is clear that both an assessment and timely notice and demand for payment of the amount assessed must be sent to a party before the IRS can take administrative collection action against that party to collect the taxes. I.R.C. §§6203, 6303, *See United States v. Chila*, 871 F.2d 101 (11th Cir. 1989), *United States v. Berman*, 825 F.2d 1053 (6th Cir. 1987), *Resyn Corp. v. United States*, 945 F.2d

1279 (3rd Cir, 1991), *Blackston v. United States*, 778 F. Supp. 244 (D. Md. 1991).[15] The IRS, in many cases, does not appear to name the general partners in separate assessments after making assessments against the partnership, notwithstanding the advice the IRS received from its counsel over thirty years ago.[16] No separate assessments were made against the partners in the present case. The absence of separate assessments against the individual partners followed by notices and demand for payment precludes the IRS from taking administrative collection action against the individual partners. *United States v. Chila, supra, United States v. Berman, supra, Resyn Corp. v. United States, supra, Blackston v. United States, supra.*

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[15] Courts have allowed the IRS to pursue collection action against third parties as "nominees" and "alter egos" of the taxpayer without affording those third parties any rights of "taxpayers" such as notice and demand. See, e.g., *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 350-351 (1977), *Wolfe v. United States*, 798 F.2d 1241 (9th Cir. 1986). These cases are arguably distinguishable because they involve a determination by the IRS that the third party should be disregarded and treated as the "taxpayer" (who presumably has already been afforded his/her statutory rights). To the extent the IRS relies on state law to make such determinations, however, the IRS, in asserting liability against third parties, even as "alter egos" or "nominees" of the taxpayer, should not have any greater remedies under state law than other creditors. *Commissioner v. Stern*, 357 U.S. 39.

[16] In theory, the IRS should be able to make "joint" assessments of the tax liability against the partnership and against the individual general partners. The IRS performs a similar function every time it assesses a joint income tax liability against both a husband and wife who file a joint income tax return. Presumably both spouses filing a joint return are entitled to separate notices and demand. And presumably the bankruptcy filing by one spouse does not affect the statute of limitations on collection against the other spouse.

Second, notice and demand for payment of the tax must be sent to a person's "last known address" or "usual place of business." I.R.C. §6303(a). The IRS, by virtue of the partnership income tax returns (Forms 1065) filed each year, is aware of each general partner's name, address and social security number. The IRS thus has the ability to access the address shown on both the most recently filed Form K-1 for each partner and on the most recently filed federal income tax return for each partner. Yet the IRS fails to send out individual notices and demand to the partners, relying instead upon the theory that notice and demand to the partnership is notice and demand to all partners.

This theory is in violation of the statute when the IRS is in possession of information showing that the "last known address" and "usual place of business" of a partner is an address other than the partnership address. See *Cool Fuel, Inc. v. Connett*, 685 F.2d 309 (9th Cir. 1982), 26 C.F.R. §301.6212-2(a).[17]

To be sure, when a partner's "usual place of business" or "last known address" is the partnership's address, it is possible that a notice and demand sent to the partner at the partnership's address will satisfy the statutory requirements under I.R.C. §6303(a). See *Wallin v. Commissioner*, 774 F.2d 674 (9th Cir. 1984) (notice of deficiency not sent to "last known address" but actually received on a timely basis was valid). Such notice, however, must be addressed specifically to the partner in order to properly advise him that the IRS is pursuing the partner's individual assets in its efforts to

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[17] The IRS gives its collection officers detailed instructions on how to determine a taxpayer's "last known address" when sending out a Notice of Intent to Levy under I.R.C. §6330. See Internal Revenue Manual §5.11.1.2.1.1.

collect the partnership taxes. A notice addressed to the *partnership*, even one sent to the partner's last known address, does not give the partner proper notice that the partner's own assets are at risk for administrative collection action. *See El Paso Refining, Inc. v. Internal Revenue Service*, 205 B.R.497 (W.D. Tex. 1996).

3. Constitutional Issues Created by IRS's Current Collection Practices

The protections and procedural safeguards afforded under the Due Process Clause of the Fifth Amendment, as applied to the federal government, and under the Due Process Clause of the Fourteenth Amendment, as applied to the states, have evolved from common law origins to guarantee the procedures necessary for the "protection of ultimate decency in a civilized society." *Adamson v. California*, 332 U.S. 46, 61 (1947).

> Early in our jurisprudence, this Court voiced the doctrine that "wherever one is assailed in his person or his property, there he may defend," *Windsor v. McVeigh*, 93 U.S. 274,277 (1876). *See Baldwin v. Hale*, 1 *Wall.* 223 (1864); *Hovey v. Elliott*, 167 U.S. 409 (1897). The theme that "due process of law signifies a right to be heard in one's defence," *Hovey v. Elliott, supra, at 417*, has continually recurred in the years since *Baldwin, Windsor, and Hovey*. Although "many controversies have raged about the cryptic and abstract words of the Due Process Clause," as Mr. Justice Jackson wrote for the Court in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950), "there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.". . . "*What the Constitution does require is "an opportunity . . . granted at a meaningful time and in a meaningful manner."* *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)(emphasis added).

Boddie v. Connecticut, 401 U.S. 371, 377-378 (1971). Some exceptional situtations do allow for post-deprivation notice and hearing, but there must be "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (quoting *Boddie v. Conn.* at 379)

Over seventy years ago, Justice Brandeis and this Court, in *Phillips v. Comm. Internal Revenue*, 283 U.S. 589 (1931), considered whether post-deprivation judicial review would meet due process concerns after distraint for corporate tax debt against a transferee of corporate assets (limited to the amount received in transfer). Justice Brandeis noted that the remedy available to the transferee was the same as the remedy which would be available to the corporate taxpayer who transferred its assets. Although judicial review would be denied until after seizure, the transferee was entitled to pre-deprivation notice and the opportunity to file a petition with the Board of Tax Appeals. The underlying need of the Government to promptly secure its revenues balanced against the right to pre-deprivation *judicial* review. *Phillips* at 596. The

Commissioner would be required to answer and there would be "a complete hearing *de novo*, according to the rules of evidence and . . . .[t]he transferee has the right to a preliminary examination of books, papers, and other evidence of the taxpayer." *Phillips* at 598. Although a judicial remedy would be delayed, there would be a timely hearing and discovery to allow the transferee to pay the debt and stop the penalties and interest; protections, which the IRS would *now deny* to general partners.

The IRS asserts that the statutory scheme for assessment, notice, and demand provides that it must grant pre-deprivation rights to the partnership, but can deny those same rights to the general partners. This is especially egregious, considering that the IRS is claiming that the original three year federal period of limitation (I.R.C. §6501) could be extended against the individual partners for ten additional years (I.R.C. §6502(a)), without notice and an opportunity to either dispute the debt or pay the tax and stop the continued accumulation of interest and penalties. In the case now before this Court, the Proofs of Claim against the Respondents, Joint App. P. 100-104, demonstrate that the interest and penalties exceeded the original tax debt in five to six years. The IRS asserts that this debt can continue to grow for up to thirteen years without any notice to the individual general partners. This hardly seems to comport with the fundamental fairness of "*an opportunity . . . granted at a meaningful time and in a meaningful manner*" that the Due Process Clause mandates. *Boddie v. Conn.* at 378 and *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (both quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)(emphasis added))

In *Matthews* this Court discussed factors that

due process dictates in considering the type of remedy required:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Matthews v. Eldridge* at 335.

Respondents acknowledge the important governmental interest in collecting taxes. "[T]axes are the life-blood of government, and their prompt and certain availability an imperious need." *Bull v. United States*, 295 U.S. 247, 259 (1935). However, the burden on the IRS to assess, and give notice and demand for payment to the individual partners is negligible (the information is readily available to the IRS) compared to the harm - the continuing accumulation of interest and penalties without the individual partner's receipt of notice and the ability to pay the tax and/or dispute the debt. Surely, thirteen years of interest and penalties, without recourse, is not "*fundamentally fair.*"

In *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), this Court held that notice to a mortgagee of a pending tax sale by publication violated the Due Process Clause of the Fourteenth Amendment where the address of the mortgagee was publicly available for the purpose of providing personal notice. This Court stated that "notice by publication must be supplemented by notice mailed to the mortgagee's last

known available address, or by personal service."

The principle set forth in *Adams* applies with equal force to the IRS. When sending notice to the partners, the IRS may not rely on notice sent to the partnership. This is because the IRS has the actual addresses of the partners in its possession.

All of these statutory and constitutional issues need not be addressed, however, if this Court holds that Respondents are "taxpayers" who must be individually named by the IRS in an assessment of a tax within the three year period of limitations set forth in I.R.C. §6501.

CONCLUSION

California law imposes joint and several liability on partners; joint and several liability confers primary liability making the individual partners "taxpayers." The IRS then has a choice of remedies: It can sue under either state law or federal law pursuant to the limitations period of I.R.C. §6501(a) or can assess the tax against the partnership and against some or all of the general partners. The IRS has the means readily available to identify the individual general partners, and therefore, little additional burden falls on the United States in securing all those primarily liable. The assessment allows administrative collection and extends the time for suit against the *assessed taxpayers* for ten years from the date of assessment. Assessment "triggers" notice and demand for payment pursuant to I.R.C. § 6303 which allows the noticed taxpayers to elect to either pay the tax, interest and penalties which have accumulated, and stop further liability, or to continue liability and possible collection for additional penalties and interest. Assessment of the

individual partners extends the limitations period for the United States to pursue its collection activities against all those liable for the partnership tax debt.

The issue to be decided is not one of liability, but whether the tax debt is collectible against the individual general partners. The IRS did not obtain a judgment against the individual general partners, and the time to do so had expired. The assessment only extended the limitations period as to the Partnership; therefore, the IRS does not have allowable bankruptcy claims and the Ninth Circuit's decision should be affirmed.

The Government's claim that $10 billion is at stake because of the IRS's failure to timely assess individual general partners is indeed unfortunate. The statutory scheme enacted by Congress surely did not intend such "an intolerable drain on the public fisc." *United States v. California*, 507 U.S. 746, 759 (1993). If that is indeed the result of upholding the Ninth Circuit's decision in this case, it arises because the IRS failed to follow the advice of its own counsel to utilize its readily accessible information, to assess the individual partners, and to provide them notice and demand for payment. We must agree with the Seventh Circuit's statement in *Wright*, 57 F.3d at 564: "[W]e confess to puzzlement at the IRS's contention that federal law favors forswearing collection from partners until the partnership has run out of money. A credible threat to collect from the partners would improve the prospect of collecting from the partnership, to the benefit of the Treasury."

Respectfully submitted,

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

ABEL COSMO GALLETTI AND SARAH GALLETTI; AND FRANCESCO BRIGUGLIO AND ANGELA BRIGUGLIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

	Page
Introduction	1
A. The federal employment taxes involved in this case were validly assessed by the Commissioner	3
1. The employment taxes were imposed on the partnership as the employer, and the partners are derivatively liable for those taxes	3
2. An assessment of employment taxes is complete when the amount of taxes determined to be due is recorded by the Secretary	7
3. Notice of the assessment is not required befor a judicial collection proceeding may be commenced	9
B. Under 26 U.S.C. 6502(a), the time for commencing a "proceeding in court" to collect unpaid taxes extends to "10 years after the assessment of the tax"	11
1. The time for commencing this judicial collection proceeding was extended for ten years by the assessment of the employment taxes	11
2. The new statute of limitations argument that respondents seek to raise was waived by their failure to raise it in the courts below	12
3. The new statute of limitations argument that respondents seek to raise is foreclosed by the decisions of this Court	13
4. The agency's administrative collection practices are not at issue in this case and, in any event, are not unconstitutional	17
Conclusion	18

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Cases:

American Sur. Co. v. *Sundberg*, 363 P.2d 99 (Wash. 1961), cert. denied, 368 U.S. 989 (1962) 10
Anderson v. *United States*, 15 F. Supp. 216 (Ct. Cl. 1936), cert. denied, 300 U.S. 675 (1937) 9
Bellas v. *CBS, Inc.*, 221 F.3d 517 (3d Cir. 2000), cert. denied, 531 U.S. 1104 (2001) 5
Boddie v. *Connecticut*, 401 U.S. 371 (1971) 17
Bresson v. *Commissioner*, 213 F.3d 1173 (9th Cir. 2000) 16
Bull v. *United States*, 295 U.S. 247 (1935) 14
Estate of Marcos Litigation, In re, 978 F.2d 493 (9th Cir. 1992), cert. denied, 508 U.S. 972 (1993) 12
Geisinger Health Plan v. *Commissioner*, 30 F.3d 494 (3d Cir. 1994) 5
G.M. Leasing Corp. v. *United States*, 429 U.S. 338 (1977) 14
Goldston, In re, 104 F.3d 1198 (10th Cir. 1997) 17
Guaranty Trust Co. v. *United States*, 304 U.S. 126 (1938) 14, 15
Heyward v. *United States*, 2 F.2d 467 (5th Cir. 1924) 10
Kontrick, In re, 295 F.3d 724 (7th Cir. 2002), cert. granted, No. 02-810 (argued Nov. 3, 2003) 12
Leighton v. *United States*, 289 U.S. 506 (1933) 7, 8
Livingston v. *Department of Treasury*, 456 N.W.2d 684 (Mich. 1990) 4
Phillips v. *Commissioner*, 283 U.S. 589 (1931) 14, 17, 18
Remington v. *United States*, 210 F.3d 281 (5th Cir. 2000) 5
Stichting Pensioenfonds Voor de Gezonheid, Geestelijke en Maattschappelikje Belangen v. *United States*, 129 F.3d 195 (D.C. Cir. 1997), cert. denied, 525 U.S. 811 (1998) 5

Cases—Continued: Page

Underwood v. *United States*, 37 F. Supp. 824 (E.D. Tex. 1939), aff'd, 118 F.2d 760 (5th Cir. 1941) 10
United States v. *Botefuhr*, 309 F.3d 1263 (10th Cir. 2002) 11
United States v. *California*, 507 U.S. 746 (1993) 14, 15, 16
United States v. *DeTar*, 832 F.2d 1110 (9th Cir. 1987) 12
United States v. *Dixieline Fin., Inc.*, 594 F.2d 1311 (9th Cir. 1979) 7
United States v. *John Hancock Mut. Life Ins. Co.*, 364 U.S. 301 (1960) 13
United States v. *Summerlin*, 310 U.S. 414 (1940) 13, 14
United States v. *Updike*, 281 U.S. 489 (1930) 11, 16
United States v. *Williams*, 514 U.S. 527 (1995) 8
United States v. *Wright*, 57 F.3d 561 (7th Cir. 1995) 5, 8-9, 11, 16
Vons Cos., Inc. v. *United States*, 51 Fed. Cl. 1 (2001) 5
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Young v. *Ridell*, 283 F.2d 909 (9th Cir. 1960) 8

Statutes:

Internal Revenue Code (26 U.S.C.):

26 U.S.C. 3102(b) 3
26 U.S.C. 3111(a) 3
26 U.S.C. 3301 3
26 U.S.C. 3403 3
26 U.S.C. 6013 6
26 U.S.C. 6201 6
26 U.S.C. 6201(a) 7
26 U.S.C. 6203 9
26 U.S.C. 6303 ..... 2, 10
26 U.S.C. 6303(a) 10
26 U.S.C. 6321 10

Statutes—Continued: Page

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26 U.S.C. 6501 12
26 U.S.C. 6501(a) 9, 11, 16, 17
26 U.S.C. 6502 12
26 U.S.C. 6502(a) 2, 11, 12, 16
26 U.S.C. 6671 6
26 U.S.C. 6672 6
26 U.S.C. 6901(a) 6
26 U.S.C. 7701(a)(1) 8
26 U.S.C. 7701(a)(1)(iii) 8
26 U.S.C. 7701(a)(1)(iv) 8
26 U.S.C. 7701(a)(14) 7, 8
26 U.S.C. 7701(a)(14)(ii) 7
28 U.S.C. 1346(a)(1) 8
Uniform Partnership Act § 307 cmt. 4 (1997), 6 U.L.A. 125 (2001) 2-3, 4
Cal. Corp. Code (West Supp. 2003):
§ 16201 4
§ 16306(a) 3
Cal. Civ. P. Code § 338(a) (West Supp. 2003) 13

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Black's Law Dictionary (5th ed. 1979) 3
A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership* (Supp. 2003-2) 4
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M. Saltzman, *Practice and Procedure* (2d ed. 1991) 7

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INTRODUCTION

This case presents the question whether, in order to enforce the derivative liability of partners for the tax debts of their partnership, the United States must, as a matter of federal law, make a separate assessment of the taxes owed by the partnership against each of the partners directly. Pet. i. As explained in the government's opening brief, (i) the federal employment taxes involved in the case were imposed by the Internal Revenue Code directly upon the partnership in which respondents were general partners, (ii) those taxes were then validly assessed under the applicable provisions of the Internal Revenue Code, and (iii) the partners are derivatively liable under state law for all valid debts of the partnership, including its unpaid taxes. U.S. Br. 10-12. Because a valid assessment of these taxes was made, the United States had 10 years to bring a "proceeding in court"

to collect the unpaid taxes either from the partnership or from the partners: 26 U.S.C. 6502(a). This action was brought within that 10-year period. The court of appeals thus erred in concluding that the United States could not bring this "proceeding in court" to enforce its claim without first assessing the taxes against each of the partners individually. Pet. App. 8a, 16a.

Much of respondents' brief has no bearing on the federal tax issue that is presented in this case. Respondents instead have stressed new claims that they did not raise below and that, in any event, are plainly without merit.[1] Moreover, to the extent that respondents *have* addressed the question before the Court in this case, they have made a striking concession in their brief, in which they acknowledge that "If Respondents are secondarily liable for the partnerships taxes then the Ninth Circuit's ruling that the IRS must assess the Respondents to collect the partnership taxes is incorrect" (Resp. Br. 3). As we discuss in detail below, it is well established that the liability of partners for the debts of their partnership is secondary or derivative rather than primary. The partnership is itself "a separate entity," and the partners are "in the nature of guarantors" rather "than principal debtors" on the debts of the partnership. Uniform Partnership Act § 307 cmt. 4 (1997), 6 U.L.A. 125 (2001). Respondents' concession that the government need not make an assessment against them directly in order to bring this suit to enforce their secondary liability for the partnership tax debts is sufficient by itself to resolve this case in the government's favor.

[1] For example, respondents spend much of their brief discussing the agency's authority to pursue an "administrative collection action" (Resp. Br. 6-7, 12, 14-16, 20-27, 34-42, 46-47). This case, however, plainly does not involve "administrative collection activity." Instead, this case involves a judicial collection action brought by the United States in bankruptcy court. Pet. App. 5a. As we explained in our opening brief, the requirement that notice of the assessment and demand for payment under Section 6303 be given prior to the seizure and sale of property by administrative levy is *not* a precondition to the filing of a judicial collection suit. U.S. Br. 14-16 n.8 (citing cases). Respondents' reliance on the notice requirements of Section 6303 (Resp. Br. 2, 34) is thus clearly misplaced in this judicial collection proceeding.

Finally, respondents' newly minted contention that this federal tax collection action should be barred by a state statute of limitations (Resp. Br. 30-34) was not raised below and therefore may not be raised at this time. Their untimely contention that a state statute of limitations applies to this case is, in any event, squarely foreclosed by the decisions of this Court.

A. THE FEDERAL EMPLOYMENT TAXES INVOLVED IN THIS CASE WERE VALIDLY ASSESSED BY THE COMMISSIONER.

1. *The Employment Taxes Were Imposed On The Partnership As The Employer, And The Partners Are Derivatively Liable For Those Taxes.* Respondents acknowledge that "there is no provision in the Internal Revenue Code which states that general partners are liable for taxes of a partnership." Resp. Br. 19. The Code instead imposes the employment taxes involved in this case directly on the partnership, as the "employer" within the meaning of Sections 3102(b), 3111(a), 3301, and 3403. U.S. Br. 16; Pet. App. 50a, 62a. Partners are responsible for the unpaid taxes owed by the partnership because they are derivatively liable under state law for all of the unpaid debts of the partnership. Cal. Corp. Code § 16306(a) (West Supp. 2003); *Young* v. *Riddell*, 283 F.2d 909, 910 (9th Cir. 1960). The liability of partners for the taxes owed by the partnership is dependent on, and secondary to, the primary liability of the partnership. It is therefore "derivative" by definition. See *Black's Law Dictionary* 399 (5th ed. 1979) ("Derivative. Coming from

another; taken from something preceding; secondary. That which has not its origin in itself, but owes its existence to something foregoing. Anything obtained or deduced from another."); *Livingstone* v. *Department of Treasury*, 456 N.W.2d 684, 688-689 (Mich. 1990).

Respondents nonetheless claim that their liability for such taxes should be regarded as "primary," rather than "derivative," and that they therefore must be assessed directly for the taxes. They contend that their liability is "primary" because, under state law, they are "jointly and severally liable with their partnership" for the tax obligations (Resp. Br. 7). The "joint and several" liability to which respondents refer, however, is not "with the partnership." Instead, the partners are each derivatively liable, jointly and severally *with each other*, for the partnership's debts. Under modern partnership law, the partnership is itself "a separate entity," and the partners are "in the nature of guarantors" rather "than principal debtors" on the debts of the partnership. Uniform Partnership Act § 307 cmt. 4 (1997), 6 U.L.A. 125 (2001). See also Cal. Corp. Code § 16201 (West Supp. 2003) ("A partnership is an entity distinct from its partners."). Under the Uniform Partnership Act, which California has adopted (see U.S. Br. 10 n.4), a creditor ordinarily "cannot proceed against the partners until after exhausting remedies against the partnership" and *"the partners are essentially guarantors of an independent partnership debt rather than being directly responsible."* A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership* § 1.03(c)(4), at 1:40:1 (Supp. 2003-2) (emphasis added).

The partnership also has "primary" or "principal" liability for federal employment taxes as a matter of *federal* law. The Internal Revenue Code imposes the employment tax liability directly on the partnership as the "employer." See U.S. Br. 16. The liability of the partners is secondary, or "derivative," because it arises under state law when, as here, the

partnership fails to satisfy its federal tax obligations. *United States* v. *Wright*, 57 F.3d 561, 563 (7th Cir. 1995) (partners are "derivatively" liable under state law for the unpaid tax debts of the partnership). As the court explained in *Remington* v. *United States*, 210 F.3d 281, 283 (5th Cir. 2000), "[t]he partnership is the primary obligor and its partners are jointly and severally liable on its debts."

Nothing in the Internal Revenue Code provides any support for respondents' unanchored claim that they are "primarily liable" for the partnership's taxes.[2] Resp. Br. 2, 4, 6-

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[2] Respondents err in seeking to rely (Resp. Br. 4) on a 1970 General Counsel Memorandum that recommends that parallel assessments be issued to a partnership and to its general partners. In the first place, General Counsel Memoranda are not binding on the Commissioner and cannot be relied upon or otherwise cited as precedent by taxpayers. IRS Gen. Couns. Mem. No. 34329, 1970 WL 22475 (July 31, 1970); *see Stichting Pensioenfonds Voor de Gezondheid, Geestelijke en Maatschappelijke Belangen* v. *United States*, 129 F.3d 195, 200 (D.C. Cir. 1997) (GCMs lack "precedential value"), cert. denied, 525 U.S. 811 (1998); *Vons Companies, Inc.* v. *United States*, 51 Fed. Cl. 1, 8-9, 11, 12 (2001). Moreover, although General Counsel Memoranda may provide useful guidance or background as to the agency's interpretation of the Internal Revenue Code (*see Western Co. of North America* v. *United States*, 323 F.3d 1024, 1032 (Fed. Cir. 2003); *Geisinger Health Plan* v. *Commissioner*, 30 F.3d 494, 499-500 (3d Cir. 1994)), the memorandum cited by respondents does not purport to establish an official interpretation of the law. Instead, it offers cautionary advice to revenue agents concerning steps that may be useful in avoiding controversy. For example, after discussing how different conclusions could be drawn from the caselaw, the memorandum advises that an "[a]ssessment of the penalty in the name of the partnership and each of the individual partners * * * would offer the greatest assurance that the Service had complied with the requirements of sections 6203 and 6303 of the Code." 1970 WL 22475. Respondents' effort to infer a bright-line rule of law from an abundance of caution on the part of the "anonymous Internal Revenue Service lawyer" who authored the memorandum "represents an unjustified quantum leap." *Bellas* v. *CBS, Inc.*, 221 F.3d 517, 541 (3d Cir. 2000) (Shadur, J., concurring), cert. denied, 531 U.S. 1104 (2001). Moreover, respondent's suggestion that there is a conflict between

12. The analogy drawn by respondents to spouses who file a *joint* income tax return under Section 6013 is obviously inapt, for the Code makes no provision for partners to file joint employment tax returns with their partnership. Respondents' focus on the liabilities of lenders, responsible persons, and transferees of an estate is similarly misplaced. Those liabilities arise under federal law and, in the case of responsible persons and transferees, Congress has specifically provided that those liabilities may be assessed. 26 U.S.C. 6671 (the liabilities imposed on responsible persons under 26 U.S.C. 6672 "shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes"); 26 U.S.C. 6901(a) ("The amounts of the following liabilities [including the liability of a transferee under 26 U.S.C. 6901(a)(1)(A)] shall * * * be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred."). By contrast, Congress has *not* provided for the assessment of a partner's state-law derivative liability for partnership taxes.[3] Nor has Congress required any such assessment as a prerequisite for the enforcement of the partner's derivative liability in an action to collect the partnership debts.

The liability of respondents for the employment taxes imposed on the partnership is thus secondary and derivative, rather than primary. And, given that fact, respondents concede that "the Ninth Circuit's ruling that the IRS must assess the [partners directly] to collect the partnerships taxes is incorrect." Resp. Br. 3.

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the agency's administrative practices and its position in this case (Resp. Br. 34-42) is simply incorrect. The Internal Revenue Manual makes clear that separate assessments are not required (see Resp. Br. 34-36), and none were made here.

[3] Section 6201 authorizes the assessment only of the taxes "imposed by [the Internal Revenue Code]" (26 U.S.C. 6201), and the Code does not directly impose liability on the partners for the partnership's taxes.

2. *An Assessment Of Employment Taxes Is Complete When The Amount Of Taxes Determined To Be Due Is Recorded By The Secretary.* There is another, independent reason why respondents' position in this case is incorrect. The "assessment" of "taxes" that is made under Section 6201(a) of the Internal Revenue Code, 26 U.S.C. 6201(a), is a formal record of the amount of tax that has been determined to be due. Once the "summary list of assessments" is signed by the Internal Revenue Service to record the *amount* of the tax liability, "the official act of assessment has occurred for purposes of the Code." M. Saltzman, *IRS Practice and Procedure* ¶ 10.02, at 10-4 to 10-7 (2d ed. 1991); see U.S. Br. 13-14 n.6. After the amount of a tax is so recorded, no further "assessment" is necessary to enforce that liability against *any* party who is directly or indirectly liable for the tax. As a result, this Court and the other courts of appeals have consistently held that, when an assessment of the taxes owed by the party primarily liable has been made, a judicial action may proceed to collect those taxes from parties whose liability is only derivative "without assessment" of the taxes against them directly. *Leighton* v. *United States*, 289 U.S. 506, 508 (1933); see cases cited U.S. Br. 18-24. These courts have emphasized that a "[f]urther independent assessment" against the party derivatively liable for the tax is unnecessary and "would accomplish nothing." *United States* v. *Dixieline Financial, Inc.*, 594 F.2d 1311, 1312 (9th Cir. 1979).

The court of appeals erred in this case by ignoring this precedent and in suggesting that a party whose liability is only derivative or secondary should be treated as a "taxpayer" for whom a separate assessment would be required (Pet. App. 8a). The court based its conclusion on the general definition in 26 U.S.C. 7701(a)(14), which states that a "taxpayer" is "any person subject to any internal revenue tax."

The court formulated the syllogism that (i) the term "taxpayer" includes "any person" (26 U.S.C. 7701(a)(14)); (ii) the term "person" includes "an individual" (26 U.S.C. 7701(a)(1)); (iii) a partner may be an "individual" person; and, *therefore*, (iv) a partner is a "person subject to" the employment taxes involved in this case.[4] Pet. App. 7a-8a.

That reasoning is flawed and leads to absurd conclusions. Under the court's reasoning, *any* "person" who may ultimately be required to pay a tax owed by another person (such as the executor of an estate, the recipient of a gift, or the trustee of a debtor in bankruptcy) would be said to be the "taxpayer" and therefore be subject to assessment for the taxes owed by the primary obligor. This Court has clearly held, however, that suits to collect taxes from parties whose liability is only derivative may proceed "without assessment" of the tax against them directly. *Leighton* v. *United States*, 289 U.S. at 508-509; see *United States* v. *Wright*, 57 F.3d 561, 564 (7th Cir. 1995); U.S. Br. 18-21. In short, as respondents now concede (Resp. Br. 11), a person or entity whose liability for a tax debt is only "secondary" or "derivative" is, by definition, *not* the "taxpayer" whose taxes are assessed under the Code.[5]

[4] Respondents suggest (Resp. Br. 19-20) that their claim that partners are "taxpayers" with respect to the taxes imposed on the partnership is "consistent with" this Court's holding in *United States* v. *Williams*, 514 U.S. 527 (1995). In *Williams*, this Court held that a person whose property was subject to a federal tax lien with respect to a tax for which she was not personally liable could bring a suit to recover an amount paid to remove the lien, as an action to recover a "tax" or "sum" "erroneously * * * collected under the internal-revenue laws" (28 U.S.C. 1346(a)(1)). 514 U.S. at 532. The Court held that such a person could bring an action to recover her payment even if she was not the "taxpayer" liable for the tax (*id.* at 534) and that, in the context of a refund suit, the term "taxpayer" would, in any event, be "broad enough" to include the person who actually paid the tax (*id.* at 535). The Court in *Williams* plainly did not address the question whether an assessment against a derivatively liable person is necessary in order to enforce the tax liability incurred by the person upon whom the Code directly imposes the liability. Instead, as we explained in our opening brief, this Court and other courts have consistently resolved that question in the government's favor. See *Leighton* v. *United States*, 289 U.S. at 509; U.S. Br. 18-19.

Moreover, as the predecessor of the Federal Circuit explained in *Anderson* v. *United States*, 15 F. Supp. 216, 225 (Ct. Cl. 1936), cert. denied, 300 U.S. 675 (1937), it is the "tax" and not the "taxpayer" that is assessed. Section 6501(a) specifies that it is "the amount of any tax," not the taxpayer or person derivatively liable, that is "assessed" under the Code. 26 U.S.C. 6501(a). See U.S. Br. 18-21. An assessment is a record of the liability filed "in the office of the Secretary" (26 U.S.C. 6203); U.S. Br. 13-14. Such an assessment is valid *as an assessment* even if notice of the assessment is not issued to the party who is directly liable for the tax or to any other particular individual. Notice of the assessment and demand for payment of the tax are *not* preconditions to the filing of a judicial collection suit, either against the party whose liability is primary or against parties whose liability is only derivative. See U.S. Br. 15-16 n.8 (citing cases).

3. *Notice Of The Assessment Is Not Required Before A Judicial Collection Proceeding May Be Commenced.* Much of respondents' brief is incorrectly premised on the assertion that notice of an assessment must be given to the partners before any steps to collect the taxes from the partners may proceed (Resp. Br. 6-7, 12, 14-16, 20-27). Notice of an assessment is required only for *administrative* collection of partnership tax debts by lien or levy. Before a lien or levy

[5] Respondents agree that a person whose liability for the tax is secondary or derivative is *not "the person who is identified as the taxpayer under [26 U.S.C.] 6203."* Resp. Br. 11 (emphasis original). They state that "secondarily liable persons are, by definition, not the 'taxpayer'" for assessment purposes. *Ibid.*

may be executed, notice of the assessment and demand for payment is to be given to "each person liable for the unpaid tax." 26 U.S.C. 6303(a); see 26 U.S.C. 6321, 6331(a). This case, however, does not involve liens or levies or any other aspect of the *administrative* collection process. Instead, in this case, the government seeks to enforce the derivative liabilities of the partners for the debts of the partnership through a *judicial* proceeding in bankruptcy court. Although notice of an assessment and demand for payment are prerequisites for levies and other administrative collection measures that are *not* involved in this case, such notice and demand are not required as a prerequisite for judicial proceedings for the collection of taxes through money judgments. See U.S. Br. 15-16 n.8 (citing cases).

Whether the government may undertake *administrative* collection action against partners based on an assessment of the taxes owed by the partnership—and without providing any further assessment or notice of assessment directed to each partner individually—is thus simply not at issue in this case. It should be noted, however, that courts have repeatedly concluded that "[a] demand upon the partnership is a demand upon all of the partners and is a sufficient compliance with the terms of both § 6321 [lien for taxes] and § 6303 [notice and demand for tax] of the [Code] for the purpose of making the taxes assessed a lien on the property of the individual partners." *American Surety Co.* v. *Sundberg*, 363 P.2d 99, 103 (Wash. 1961), cert. denied, 368 U.S. 989 (1962); see also *Underwood* v. *United States*, 37 F. Supp. 824 (E.D. Tex. 1939) (filing of lien notices for taxes owed by partnership causes liens to attach to partners' property as well), aff'd, 118 F.2d 760 (5th Cir. 1941); *Heyward* v. *United States*, 2 F.2d 467, 467 (5th Cir. 1924) (when partnership was dissolved and reorganized as a corporation, corporation took partnership property subject to federal tax lien, "because it had notice through the former partners, * * * who are

chargeable with notice, although the assessment was not recorded until after the partnership assets were acquired"); W. Plumb, *Federal Tax Liens* 31 (3d ed. 1972).

B. UNDER 26 U.S.C. 6502(a), THE TIME FOR COMMENCING A "PROCEEDING IN COURT" TO COLLECT UNPAID TAXES EXTENDS TO "10 YEARS AFTER THE ASSESSMENT OF THE TAX."

1. *The Time For Commencing This Judicial Collection Proceeding Was Extended For Ten Years By The Assessment Of The Employment Taxes.* As the court of appeals recognized (Pet. App. 6a), the timely assessment of the partnership's unpaid taxes within the three-year period allowed by Section 6501(a) of the Internal Revenue Code, 26 U.S.C. 6501(a), extended for ten years the period in which a judicial action could be commenced to collect that liability (26 U.S.C. 6502(a)). For the reasons detailed in our opening brief, that statute directly governs this case. U.S. Br. 18-24. An assessment of the taxes owed by the partnership as the "employer" was timely made, and this "proceeding in court" (26 U.S.C. 6502(a)) to collect that liability was commenced within ten years of the assessment. U.S. Br. 11.

The decisions of this Court and of the courts of appeals have consistently concluded that the broad text of this statute governs the time for commencing any "proceeding in court" to collect such taxes, whether that proceeding is brought against the party who is directly liable for the tax or against parties whose liability is only derivative. See, *e.g.*, *United States* v. *Updike*, 281 U.S. 489, 494 (1930); *United States* v. *Botefuhr*, 309 F.3d 1263, 1277-1278 (10th Cir. 2002); U.S. Br. 17-22 (citing cases). As the Seventh Circuit summarized in *United States* v. *Wright*, 57 F.3d 561, 563-564 (1995), "suits against persons derivatively liable for taxes are timely, or not, according to the rules for timeliness of suits against taxpayers" and a "claim against derivatively liable

persons remains alive under federal law so long as the taxpayer itself is liable."

2. *The New Statute Of Limitations Argument That Respondents Seek To Raise Was Waived By Their Failure To Raise It In The Courts Below.* In their effort to avoid this settled rule, respondents seek to raise an entirely new argument in their merits brief. Respondents now argue for the first time (Resp. Br. 30-34) that a general California statute of limitations—and not the specific federal limitations provision in 26 U.S.C. 6502(a)—should govern the time in which this federal tax collection action may be brought. Respondents' new statute of limitations claim was not raised below. It therefore has been waived and may not be raised at this time.

A statute of limitations is an affirmative defense. It is waived when, as here, it is not pled in the answer or otherwise timely raised. See, *e.g.*, *In re Kontrick*, 295 F.3d 724, 734 (7th Cir. 2002) ("As a general matter, a statute of limitations defense must be raised in an answer or responsive pleading. See Fed. R. Civ. P. 8(c) * * * . Federal Rule of Civil Procedure 8 is incorporated into the Bankruptcy Rules. See Fed. R. Bankr. P. 7008."), cert. granted, No. 02-819 (argued Nov. 3, 2003); *United States* v. *DeTar*, 832 F.2d 1110, 1114 (9th Cir. 1987) (statute of limitations "provides an affirmative defense, which is waived in this circuit if it is not asserted before or at trial"); *In re Estate of Marcos Litigation*, 978 F.2d 493, 495 n.2 (9th Cir. 1992), cert. denied, 508 U.S. 972 (1993).

In the proceedings below, respondents never suggested that a state statute of limitations applied, and the parties and the courts were in agreement that this case is governed by the *federal* statutes of limitations in Section 6501 and 6502 of the Internal Revenue Code. See U.S. Br. 12, n.5; Pet. App. 6a-8a, 14a, 16a-17a; 20a-21a, 29a, 34a, 42a-43a, 46a-47a, 54a, 59a, 66a. The decision of the court of appeals addressed

solely the question whether the time for collection provided by these governing federal statues had expired before the United States filed its claim in the bankruptcy court. Neither the parties nor the courts below addressed respondents' new contention that a state statute of limitations should govern instead.[6] That issue is also not contained within the question presented on which this Court granted certiorari. Furthermore, in their brief in opposition to the certiorari petition, respondents did not contend that any state statute of limitations should apply to this case. Respondents' newly minted argument that a state statute of limitations is available as an affirmative defense to this federal tax collection action has thus been waived by respondents, and it is not properly presented in this case.

3. *The New Statute Of Limitations Argument That Respondents Seek To Raise Is Foreclosed By The Decisions Of This Court.* In any event, respondents' new argument is squarely foreclosed by the decisions of this Court. The assertion that "the IRS is bound by the state period of limitations" where "derivative liability is based upon state law" (Resp. Br. 3, 29-34) is plainly incorrect. It has long been "well settled that the United States is *not* bound by state statutes of limitation * * * in enforcing its rights." *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940) (emphasis added); see also *United States* v. *John Hancock Mut. Life*

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[6] The state statute of limitations that respondents now cite for the first time (Resp. Br. 33, citing Cal. Civ. P. Code § 338(a) (West Supp. 2003)) merely provides generally that "[a]n action upon a liability created by statute, other than a penalty or forfeiture," must be commenced within three years. Respondents have not provided any discussion or explanation of their rationale for claiming that this statute would generally apply to claims brought against partners for tax-related partnership debts. Since the state statute of limitations was not raised in any earlier stage of this case, there is also nothing in the record or decisions below that addresses that question.

Ins. Co., 364 U.S. 301, 308 (1960) ("the United States is not subject to local statutes of limitations"); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938) (noting rule that "the sovereign is exempt from the consequences of its laches"); *Phillips* v. *Commissioner*, 283 U.S. 589, 602-603 (1931) ("The United States is not bound by state statutes of limitations unless Congress provides that it shall be.").

In *Summerlin*, the Court emphasized that, when the United States holds a claim "in its governmental capacity," the period of limitations for enforcing a claim derived from state law is determined by federal law. 310 U.S. at 417. This is because the rights of the United States, whether derived from state or federal law, are held by the United States as sovereign and:

> [w]hen the United States becomes entitled to a claim, acting in its governmental capacity, and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement.

United States v. *California*, 507 U.S. 746, 757 (1993) (quoting with approval *United States* v. *Summerlin*, 310 U.S. at 417).

In the present case, the United States brought claims against respondents to enforce its right to obtain collection of the unpaid federal tax obligation of the partnership. This tax obligation was imposed by the Internal Revenue Code, and the United States unquestionably brings its claim to collect these taxes "in its governmental capacity." As this Court has frequently noted, taxes are the "life-blood of government, and their prompt and certain availability an imperious need." *Bull* v. *United States*, 295 U.S. 247, 259 (1935); see *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 350 (1977). A claim brought by the United States to collect the federal revenue is a paradigmatic example of a claim that the

United States holds in its governmental or sovereign capacity.

Respondent errs in suggesting (Resp. Br. 32) that *United States* v. *California*, 507 U.S. at 757, supports a different conclusion. The present case differs radically from *United States* v. *California*, in which this Court concluded that a state-law claim that the United States sought to enforce had lapsed under state law *before* the United States perfected its rights. See *id.* at 756. In *California*, the rights of the party that the United States claimed to possess through a right of subrogation had "lapsed," and the Court concluded that "the claims of the United States [were therefore] also barred" because, as subrogee, it stepped into the shoes of the party whose rights it asserted. *Ibid.* The Court emphasized in *California* that rights obtained by the government by assignment from another party are not revived by such an assignment but continue to be barred if they had lapsed *prior* to the assignment, even if the government otherwise "had a right to be free from the statute of limitations." *Id.* at 758 (citing *Guaranty Trust Co.* v. *United States*, 304 U.S. 126 (1938)).

In the present case, by contrast, the United States is pursuing its sovereign right to collect unpaid federal revenues. The government's claim is not based on an assignment of rights from any other parties. It is based on the government's sovereign right to impose and then collect taxes.

The Court noted in *United States* v. *California*, 507 U.S. at 757, that claims of the United States that are based upon state-created causes of action are not subject to state limitations provisions when "either the right at issue was obtained by the Government through, or created by, a federal statute, or a federal statute provided the statute of limitations." *Ibid.* (citations omitted). When the United States exercises rights under either federal or state law "in its efforts to collect taxes," it "unquestionably is acting in its sovereign

capacity; indeed, the right to collect taxes is among the most basic attributes of sovereignty." *Bresson* v. *Commissioner*, 213 F.3d 1173, 1178 (9th Cir. 2000) (action to recover federal taxes under state fraudulent conveyance law).

The state statute of limitations therefore does not govern this action to collect unpaid federal taxes. There is, instead, a federal statute of limitations that applies directly to the government's claim in this case. Section 6502(a) of the Internal Revenue Code provides ten years after assessment for the government to bring any "proceeding in court" to obtain collection. 26 U.S.C. 6502(a). Until respondents filed their brief on the merits in this Court, all of the parties and the courts below had agreed that Sections 6501(a) and 6502(a) of the Internal Revenue Code provide the applicable limitations periods that govern this case. In holding that this same period of limitation governs not only suits against "taxpayers" but also suits against parties derivatively liable for the tax, this Court emphasized in *United States* v. *Updike*, 281 U.S. at 494, that "[t]he aim in the one case, as in the other, is to enforce a tax liability."[7]

The state statute of limitations now cited by respondents is thus inapplicable to this case not only because the United States is proceeding in its governmental capacity in collecting the federal revenue, but also because "a federal statute [has] provided the statute of limitations" for the government's claim. *United States* v. *California*, 507 U.S. at 757.

[7] Respondents suggest that this Court in *Updike* "did not preclude the possibility" (Resp. Br. 33) that a state limitations period would apply in "a suit by the IRS for secondary liability" under state law. In *Updike*, however, the Court held that the same federal limitations period that applies to tax collection actions against a party whose liability is direct applies as well to the party whose liability is only derivative. 281 U.S. at 494. See *United States* v. *Wright*, 57 F.3d at 563 ("the governing principle is all-for-one, one-for-all").

4. *The Agency's Administrative Collection Practices Are Not At Issue In This Case And, In Any Event, Are Not Unconstitutional.* Respondents' broad suggestion that "constitutional issues" are "created by the IRS's current collection practices" (Resp. Br. 42-46) is misplaced. The constitutional concerns described by respondents relate to their mistaken assertion that they are the "taxpayers" who are subject to assessment under the Code. That assertion is invalid for the reasons described above. See pages 3-9, *supra*. Moreover, this case is a judicial collection proceeding, not an administrative enforcement action. See pages 9-11, *supra*.[8] A judicial proceeding to collect a tax does not violate due process even when, as Section 6501(a) permits, it is commenced "without assessment" of the tax. 26 U.S.C. 6501(a). See *In re Goldston*, 104 F.3d 1198, 1201 (10th Cir. 1997); U.S. Br. 15 n.7. A judicial proceeding to determine and enforce a tax liability provides all the process that is due, for it affords respondents a meaningful opportunity to dispute the debt before payments of the tax must be made. See, *e.g.*, *Boddie* v. *Connecticut*, 401 U.S. 371, 378 (1971). Moreover, this Court has long held that due process is satisfied by the availability of *post*-collection judicial review of tax determinations, for "the right of the United States to exact immediate payment and to relegate the taxpayer to a suit for

[8] Respondents have suffered no deprivation of due process from any acts of administrative collection for the simple reason that no such acts have been undertaken against them. In any event, as this Court held in rejecting a similar challenge by a stockholder who, as transferee of a corporation, was derivatively liable for the taxes owed by the corporation, "[t]he right of the United States to collect its internal revenue by summary administrative proceedings has long been settled. Where, as here, adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained." *Phillips* v. *Commissioner*, 283 U.S. at 595.

recovery, is paramount." *Phillips* v. *Commissioner*, 283 U.S. at 599; see note 8, *supra*.

Finally, respondents claim that it is unfair for the partnership tax obligation to have remained unpaid for so many years, accumulating interest and penalties along the way (Resp. Br. 2, 44, 45). That claim of unfairness is extraordinarily hollow. In their capacity as general partners, respondents obviously were aware of, and benefitted from, any delay in the payment of the debts for which they were responsible. Penalties are imposed for the purpose of ensuring timely compliance, and the interest that has accrued on the tax debt is simply a reflection of the time-value of the monies that the partners should have ensured were timely paid. Interest charges do not *create* unfairness, they *avoid* the unfairness that would otherwise exist if the debtor were allowed simply to withhold (and use) funds owed to a creditor for a lengthy period of time before paying them over.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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